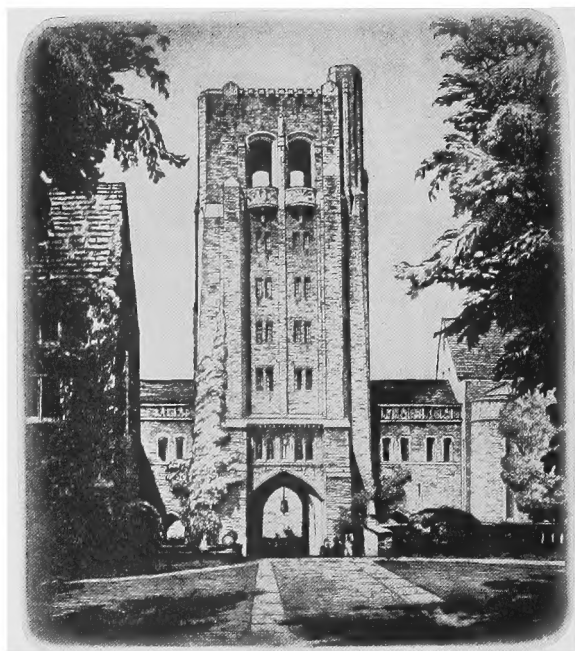




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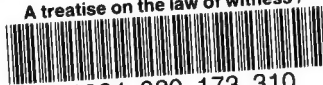


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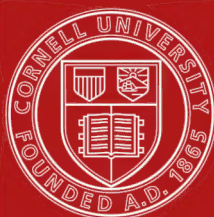
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A  
TREATISE  
ON THE  
LAW OF WITNESSES.

BY  
STEWART RAPALJE.



BANKS & BROTHERS,  
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## PREFACE.

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FIVE or six years since, while preparing a brief, the writer had occasion to look up many of the earlier as well as the more recent authorities upon the competency and credibility of witnesses; and while doing so, was greatly impressed with the discovery that these, as well as all other matters appertaining to the law of Witnesses, were very briefly and inadequately treated of in the existing text-books on Evidence.

This state of things, taken in connection with the fact that no distinctive treatise on witnesses had ever been written, so far as he could ascertain, by any English or American legal author, induced the writer to prepare this book, in the hope that it would serve to fill one of the few still remaining gaps in the literature of the law.

The inherent difficulty of the task has been greatly increased by the want of harmony among the decisions upon nearly every important point; this having been, doubtless, occasioned by the same state of affairs that inspired the idea of undertaking the task.

The main endeavor has been to cite all the cases exhibiting the different shades of opinion, leaving it, generally, for the reader to pin his faith to such of them as, in his judgment, most correctly lay down the law; but the writer has not hesitated to denounce as unsound some few decisions which appeared to him to be clearly

wrong and in no way reconcilable with fundamental principles of law.

If the book meets with the same kind indulgence at the hands of the bar, which his former works have been so fortunate as to receive, the two years' labor bestowed upon its preparation will, by no means, be time thrown away.

S. R.

LEONIA, N. J., May 1, 1887.

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PART I.



COMPETENCY.



# THE LAW OF WITNESSES.

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## PART I.—COMPETENCY.

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### CHAPTER I.

#### OF MENTAL DISQUALIFICATIONS.

- § 1. Preliminary Observations.
- § 2. Insufficient Understanding.
- § 3. Idiots.
- § 4. Insane Persons.
- § 5. Intoxicated Persons.
- § 6. Deaf-Mutes.
- § 7. Children: Age as affecting Competency.
- § 8. The Requisite Religious Instruction.
- § 9. Competency of Witness as dependent upon Means of Knowledge.
- § 10. Effect of Imperfect Recollection.

§ 1. **Preliminary Observations.**—A witness is a means or instrument of evidence, *i.e.* of *unwritten* or *oral* evidence; his function is to inform the tribunal or officer before whom he testifies as to matters of fact. Obviously, in order to the proper exercise of this important function, the proposed witness must possess certain qualifications, or, to speak more accurately, he must not labor under certain disqualifications, to be presently considered, or he will be rejected by the court or magistrate as an *incompetent* witness, and his testimony excluded. The chief reason for the exclusion of the testimony of such a witness is, that it would, if admitted, tend to mislead the jury; and it is clear that the propriety of the exclusion in each particular case must largely depend upon the constitution of the tribunal to which the evidence is submitted, and the mode of proceeding before it. Then, too, the difference which exists between judicial investigations and the ordinary transactions of life, must be con-

sidered more especially with regard to the space of time allowed for decision, the temptations to deceive, the facilities of deception, and the consequences of deciding incorrectly.<sup>1</sup>

At common law the disqualifications which rendered a witness incompetent to give any evidence at all were: (1) Insufficient understanding; (2) Refusal to be sworn or to acknowledge the sanction of an oath; (3) Infamy arising from conviction of crime; (4) The position of the proposed witness as a party to the controversy under investigation; and (5) His being interested in the event of the matter in issue to any extent, no matter how trifling.<sup>2</sup>

Let us now examine these common law disqualifications in the order above given, noting as we proceed the statutory changes which both in England and America have entirely swept away some of them, and greatly circumscribed the former almost universal applicability of those of them which still may be said to have the force of rules of law.

§ 2. **Insufficient Understanding.** — The disqualification first mentioned in the preceding section is that of mental deficiency. This defect, whatever may have been its cause; whether it be temporary or permanent, curable or incurable; whether it be due to the tender years of the witness, or to some disease, intemperate habits, loss of memory, or any other cause, is absolutely fatal to the competency of the witness so long as it exists: on its removal, however, the witness' competency is restored. Persons laboring under this kind of disqualification are, *Idiots*, *Insane persons*, *Intoxicated persons*, *Deaf-mutes*, and *children*. Each of these classes will be considered in turn.

§ 3. **Idiots.** — An idiot is defined to be one who from his nativity is by a perpetual infirmity *non compos mentis*.<sup>3</sup> His infirmity is incurable, and he can under no circumstances become a competent witness. In his case, as in that of an insane person, the great safeguard provided by the law in

<sup>1</sup> 1 Phill. Ev. (4 Am. ed.) 7; 1 Greenl. Ev. § 326.

<sup>2</sup> Some writers name a sixth class, in which they include grand and petit jurors, whose incompetency to testify as to matters upon which they have deliberated in the secrecy of the jury-

room, is grounded upon principles of public policy, and is, in the present writer's opinion, rather an inhibition upon the disclosure of certain facts than a disqualification of the witness to testify at all.

<sup>3</sup> Co. Litt. 247, a.



order to secure the truth of oral evidence, viz. that it be delivered under the sanction of an oath, is wanting; for not being capable of comprehending either the nature and obligation of an oath, or the temporal or spiritual consequences of its violation, its administration to him would be an idle ceremony.<sup>1</sup>

Lord Hale classes persons born deaf and dumb as idiots;<sup>2</sup> but such a position would hardly be accepted at this day, although later authorities in England maintain that one who is born deaf, dumb, and blind, must be regarded as in the same state as an idiot, being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.<sup>3</sup> However this may be, the fact that the proposed witness is an idiot must be proved by other testimony, and not by a preliminary examination of the witness; and even if the court have any discretion by which they may permit such preliminary examination, still it is not error for them to refuse to allow it.<sup>4</sup>

§ 4. **Insane Persons.**—A madman, or person permanently deranged, is as fully disqualified as an idiot, and for the same reason;<sup>5</sup> and proof of incompetency for such cause is admissible.<sup>6</sup> But if the witness, though insane, be capable of understanding the obligation of the oath and of giving a correct account of things seen or heard in connection with the issue, he is competent.<sup>7</sup> Thus a lunatic is competent during a lucid interval.<sup>8</sup> The question is whether the witness is insane at the time he is offered as a witness, and this question is a preliminary one to be decided by the court.<sup>9</sup>

A respectable text-writer observes that the witness, to be competent, must have been in possession of his intellect at the time of the event to which he testifies, as well as at the

<sup>1</sup> See *Gebhard v. Shindle*, 15 S. & R. (Pa.) 235; *Phebe v. Prince*, Walk. Rep. 131; *Kilburn v. Mullen*, 22 Iowa, 498; *Fuller v. Fuller*, 17 Cal. 605; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865.

<sup>2</sup> 1 Hale, P. C. 34.

<sup>3</sup> 1 Bl. Com. 304; 2 Steph. Com. 530. See *infra*, § 6; *Reg. v. Guttridge*, 9 Carr. & P. 471; *Reg. v. Megson*, Id. 428.

<sup>4</sup> *Robinson v. Dana*, 16 Vt. 474.

<sup>5</sup> Com. Dig. tit. Testmoigne, A. 1; *Livingston v. Kiersted*, 10 Johns. (N. Y.) 362.

<sup>6</sup> *Livingston v. Kiersted*, *supra*.

<sup>7</sup> *District of Columbia v. Armes*, 107 U.S. 519. *S. P. Coleman v. Commonwealth*, 25 Gratt. (Va.) 865.

<sup>8</sup> *Evans v. Hettich*, 7 Wheat. (U. S.) 453, 470; *Campbell v. State*, 23 Ala. 44.

<sup>9</sup> *Rex v. Hill*, 20 Law J. 222, m; *Holcomb v. Holcomb*, 28 Conn. 177; *Cannady v. Lynch*, 27 Minn. 435.

time of his examination; and that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed.<sup>1</sup> But the Supreme Court of Connecticut has held that the question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes only to the *credibility* of his testimony and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence; and to be proved in the same manner as insanity in any other case.<sup>2</sup> And other respectable decisions hold that one who has been adjudged restored to sanity may testify as to facts that occurred while he was under guardianship as insane.<sup>3</sup>

The burden of proof as to restoration to sanity rests upon the party offering the witness. Thus an inquisition of lunacy found against one is *prima facie* evidence of his incompetency, and unless it be overcome by evidence of his sanity, he should not be permitted to testify, even as against one not a party to the proceedings in lunacy.<sup>4</sup> But the fact of insanity must, in the first instance, be proved by the party objecting to the witness.<sup>5</sup>

As respects the competency of persons afflicted with *monomania*, i.e. unsoundness of mind upon one particular subject (not a part of the matter in issue), Mr. Roscoe advises the exclusion of their testimony,<sup>6</sup> and the Privy Council of England have said that if the mind is unsound on one subject, and this unsoundness at all times exists upon that subject, the mind of such a person cannot properly be considered really sound upon other subjects.<sup>7</sup>

§ 5. **Intoxicated Persons.**—Much of what has been already said applies to this class of incompetent witnesses, with the single qualification that while in the case of idiocy, or

<sup>1</sup> Allison (Scotch), Pr. 436.

<sup>2</sup> Holcomb v. Holcomb, *supra*.

<sup>3</sup> Sarbach v. Jones, 20 Kan. 497.

Compare Endel v. Walls, 16 Fla. 786.

<sup>4</sup> Hoyt v. Adce, 3 Lans. (N. Y.) 173.

S. P. Armstrong v. Timmons, 3 Harr. (Del.) 342.

<sup>5</sup> State v. Holloway, 8 Blackf. (Ind.) 45.

<sup>6</sup> Rosc. Cr. Ev. p. 128. Mr. Best, however, calls this "hard measure." Best, Princ. Ev. p. 168.

<sup>7</sup> Waring v. Waring, 12 Jur. 947, a case where a will was set aside on the ground of mental incapacity in the testator caused by *monomania*. In another case (a trial for manslaughter), the witness' delusion, both at the

insanity, the party objecting to the witness must prove his incapacity, and may call witnesses for that purpose, yet in the case of a person called as a witness while in a state of intoxication, *the court* may decide from its own view, whether the witness is in such a situation that he ought not to be permitted to testify.<sup>1</sup> If competent at the time his evidence is offered, it is no objection to his admission that he has been found to be an habitual drunkard, and his estate committed to trustees;<sup>2</sup> nor can his intemperate habits be proved to impeach his competency.<sup>3</sup>

§ 6. **Deaf-Mutes.**—Where a person deaf and dumb from birth is offered as a witness, the burden of proving his possession of sufficient understanding to become a competent witness rests on the party offering him. This results from the ancient presumption laid down by Lord Hale, that persons so situated are to be deemed the same as idiots.<sup>4</sup> In view, however, of the fact that modern science has discovered a way of educating these unfortunate persons, who have been found to be of much greater intelligence than was anciently supposed, less evidence is now required than formerly to rebut this presumption, if, indeed, it may still be deemed to have any force. Sufficient understanding being shown, a deaf-mute may be sworn and give his testimony through an interpreter.<sup>5</sup> Such a witness is competent, in Indiana, if he has sufficient discretion, and understands that perjury is punishable by law, though he has no conception of the religious

time of the transaction and of the trial, was that he was possessed of twenty thousand spirits. He appeared to understand the obligation of an oath, and to believe in future rewards and punishments, and a physician testified that in his opinion the witness could give an account of any transaction that happened before his eyes. His testimony was admitted, the court holding that in the case of such a delusion, it was for the court to decide upon the competency of the witness, and for the jury to pass upon his credibility. *Reg. v. Hill*, 15 Jur. 470; 5 Eng. L. & Eq. 547; 5 Cox. Cr. Cas. 259.

<sup>1</sup> *Hartford v. Palmer*, 16 Johns. (N. Y.) 143. Compare *Gould v. Crawford*, 2 Pa. St. 89; *Cannady v. Lynch*, 27 Minn. 435.

<sup>2</sup> Pa. Act, Feb. 25, 1819; *Gebhard v. Shindle*, 15 S. & R. (Pa.) 235, 238.

<sup>3</sup> *Thayer v. Boyle*, 30 Me. 475. In a late case in Washington Territory, it is held that the exclusion of an intoxicated witness from the court-room, and the refusal of the court to permit him to testify, is not error; but it might constitute a ground for a new trial if the party offering the witness informed the court of the importance of his testimony, and asked an adjournment of the trial until he became competent to testify, and the court refused the request. *Fox v. Territory*, 5 West Coast Rep., 339.

<sup>4</sup> See *supra*, § 3.

<sup>5</sup> *Ruston's Case*, 1 Leach, C. C. 408; 1 Russ. Cr. p. 7.

obligation of an oath.<sup>1</sup> If he can write sufficiently well to communicate ideas perfectly in that way, he will be required to give his testimony in writing;<sup>2</sup> but he may resort to signs, though it appears that he can read and write, and communicate ideas, imperfectly, by writing.<sup>3</sup>

§ 7. **Children: Age as affecting Competency.**—The law fixes no precise age within which children are absolutely excluded as witnesses. Their competency depends upon their intelligence, judgment, understanding, and ability to comprehend the nature and effect of an oath.<sup>4</sup> If over the age of fourteen, the law presumes the witness to possess common discretion and understanding, and he will not be interrogated respecting his capacity, unless some reason creating suspicion be shown;<sup>5</sup> but if he be under that age, no such presumption exists, and the court will determine, in the exercise of a sound discretion, whether the witness has the requisite capacity and intelligence;<sup>6</sup> and that discretion is not reviewable in an appellate court, except upon a clear showing of its abuse.<sup>7</sup>

<sup>1</sup> *Snyder v. Nations*, 5 Blackf. (Ind.) 295.

<sup>2</sup> *Morrison v. Lennard*, 3 Car. & P. 127.

<sup>3</sup> *State v. De Wolf*, 8 Conn. 93; *Commonwealth v. Hill*, 14 Mass. 207; *Snyder v. Nations*, *supra*. As to the admissibility of the declarations (communicated by signs) of a deaf and dumb female upon whom a rape is alleged to have been committed, to prove the commission of the offence, or describe the guilty person, see *People v. McGee*, 1 Den. (N. Y.) 19, 24; *Reg. v. Guttridge*, 9 Car. & P. 471; *Reg. v. Megson*, Id. 428.

<sup>4</sup> *Flanagan v. State*, 25 Ark. 92; *Warner v. State*, Id. 447; *People v. Bernal*, 10 Cal. 66; *State v. Denis*, 19 La. Ann. 119; *State v. Whittier*, 21 Me. 341; *Brown v. State*, 2 Tex. App. 115; *State v. Richie*, 28 La. Ann. 327;

At one time the English rule was that no child under nine, and very few under ten years of age should be admitted, *Rex v. Travers*, 2 Str. 700. See also 1 East, P. C. 442; 1 Hale, P. C. 302; 2 Id. 278; but this rule was found to be unwise, in some instances

depriving children of the protection of the law against acts of violence. In *Brazier's Case* (which was an indictment for an indecent assault upon a girl of five years), the English judges unanimously adopted the rule stated in the text (which has ever since been followed), but insisted upon the administration of an oath in every case. 1 Leach, C. C. 199; 1 East, P. C. 443; B. N. P. 293. See also *R. v. Perkin*, 2 Moo. C. C. 139.

<sup>5</sup> *Den v. Vaneleve*, 2 South. (N. J.) 580. In Indiana, the age of ten is the statute period of presumption, *Blackwell v. State*, 11 Ind. 196; *Holmes v. State*, 88 Ind. 145.

<sup>6</sup> *State v. Richie*, 28 La. Ann. 327; *Anonymous*, 2 Penn. (N. J.) 930; *Van Pelt v. Van Pelt*, Id. 657; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98.

<sup>7</sup> *Peterson v. State*, 47 Ga. 524; *State v. Denis*, 19 La. Ann. 119; *State v. Jackson*, 9 Oreg. 457; *Brown v. State*, 6 Tex. App. 286; *Ake v. State*, Id. 398; *Burk v. State*, 8 Id. 336; *Williams v. State*, 12 Id. 127.

The following summary of the adjudged cases will serve to illustrate

§ 8. **The Requisite Religious Instruction.**—Thus we see that while age standing alone (the requisite intelligence being present) is by no means a criterion by which to judge of the competency of children as witnesses, yet their admissibility depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received sufficient religious instruction to enable

to what extent the examination as to intelligence has been carried by judges in these cases, where the witness is within the statutory age of presumption: In *Spears v. Snell* (74 N. C. 210), a boy of thirteen was permitted to testify and consulted as to his own wishes, where the question was as to his custody and guardianship. In *State v. Scanlon* (58 Mo. 204), on a trial for murder, a child of nine years who, after a little delay, was able to give intelligible answers, although at first, from the novelty of the surroundings, etc., she was prevented therefrom by nervous agitation, was admitted. In *Jenner's Case* (2 C. H. Rec. (N. Y.) 147-149), where, though nine years old, and quite intelligent, the witness did not comprehend the nature of an oath, nor the consequences of false swearing, the judge instructed her on the spot, and admitted her testimony. In *Davidson v. State* (39 Tex. 129), a child of ten who said, "That she did not know what God and the laws of the country would do to her if she swore falsely, but that she would tell the truth," was held competent. In *Blackwell v. State* (11 Ind. 196), it was held that a child under ten, who does not know how perjury will be punished, but believes it will be; who knows that it is not right to swear to a lie, and says she would tell the truth if sworn, and always, if mother wanted her to, and that her mother had told her to in this case, may be presumed to have been competent, the court below having admitted her. See also *Commonwealth v. Hutchenson*, 10 Mass. 225. In *Commonwealth v. Carey* (2 Brews. (Pa.) 404), a child of eight was sworn although she had stated that she did

not know how to read, or what the Bible was,—she having replied that she must tell the truth when on the stand, and if not, she would "Go to the big fires of hell." See also *Wade v. State*, 50 Ala. 164. So it has been held that on a criminal trial a child of seven may testify. *Washburn v. People*, 10 Mich. 372, *State v. Morea*, 2 Ala. 275, and if corroborated by circumstances, his testimony is sufficient to justify a conviction of a capital crime, although that testimony is contradicted by the evidence of an adult; the credibility of the witnesses being left to the jury. *State v. Le Blanc*, 1 Treadw. (S. C.) Const. 354; *State v. Le Blanc*, 3 Brev. (S. C.) 339. And the fact that such a child is not punishable for perjury makes no difference. *Johnson v. State*, 61 Ga. 35. See also *State v. Richie*, 28 La. Ann. 327; *McGuire v. People*, 44 Mich. 286.

On the other hand, it is held that a child nine years old, whose examination shows an utter want of anything like a knowledge of the nature or character and consequences of an oath, is not a competent witness. *Williams v. State*, 12 Tex. App. 127. So held where she said on her examination that she did not know what the Bible was; that she had been to church but once; that she had heard of God, but did not know who he was; and, that if she swore to a lie, she would be put in jail, but did not know whether she would be punished in any other way. *Carter v. State*, 63 Ala. 52; s. c. 35 Am. Rep. 4. Where the witness is a mere infant (four years old), he cannot have that idea of a future state which will make him a competent witness. *Rex v. Pike*, 3 Car. & P. 598.

them to comprehend the nature of an oath and the consequences of perjury.<sup>1</sup> The examination as to this matter should be made by the court<sup>2</sup> without the interference of counsel further than the judge may choose to allow,<sup>3</sup> and the court, in a proper case, may explain the matter and instruct the child, and then determine whether or not he shall be sworn and permitted to testify.<sup>4</sup> Some of the English judges have even gone so far as to postpone the trial, where the child was the principal witness, in order to afford an opportunity to impart the necessary instruction upon this subject;<sup>5</sup> but this practice is not favored in England, and so far as the writer knows, has not been adopted in this country.<sup>6</sup>

**§ 9. Competency of Witness as Dependent upon Means of Knowledge.**—A witness otherwise competent should not be rejected because it seems to the court that he has had but little opportunity to acquire knowledge of the facts as to which he is called upon to testify. The rule is that as between living witnesses, one is not to be excluded because another had a better opportunity of knowing a fact deposed

<sup>1</sup> *Carter v. State*, 63 Ala. 52; s. c. 35 Am. Rep. 4; 1 So. L. Jour. & R. 796; 2 Week. Jur. 559.

<sup>2</sup> *People v. McNair*, 21 Wend. (N. Y.) 608.

<sup>3</sup> *Carter v. State*, *supra*.

<sup>4</sup> *Ibid.* A child produced as a witness, who understands that he is brought to court to tell the truth, that it is wrongful to tell a lie, and that he will be punished if he tells a lie, has sufficient understanding of the obligation of an oath to be competent. *State v. Levy*, 23 Minn. 104. So held of a girl nine years old, who testified on her *voir dire* that she understood the nature of an oath, and that if she did not swear the truth, she would get into hell-fire. *Draper v. Draper*, 68 Ill. 17; and of another, who, on being asked what would become of her if she swore to a lie, answered, "I shall go to the bad world." *Vincent v. State*, 3 Heisk. (Tenn.) 120. So held also where the answer was, "The bad man will get me." *Longston v. State*, 3 Heisk. (Tenn.) 414.

In a comparatively recent English case, a child of eight was called, who, up to the time of the event to which she was to testify, had received no religious teaching, and had never even heard of a God. During a period of about sixteen weeks before the trial she had been, on two occasions, visited and instructed by a clergyman as to the nature and obligation of an oath, but at the trial, still seemed to have no real understanding on the subject of religion or a future state. Her testimony was rejected, *Patterson, J.*, saying he must be satisfied she felt the binding obligation of an oath from the general course of her religious education, and not merely from instructions recently communicated for the purposes of the trial. *Rex v. Williams*, 7 Car. & P. 320.

<sup>5</sup> *Rex v. White*, 2 Leach, C. C. 430 n. (a); *Rex v. Wade*, 1 Moo. C. C. 86.

<sup>6</sup> See *Rex v. Williams*, 7 Car. & P. 320; *Reg. v. Nicholas*, 2 Car. & K. 246; *Powell, Ev.* 19; *Rex v. Pike*, 3 Car. & P. 598.

to.<sup>1</sup> Thus, one who has heard certain statements, in themselves competent evidence, on which a party to a suit claims to have acted, is a competent witness thereto, although the speaker himself might have been summoned;<sup>2</sup> and instructions to an agent may be proved by one standing by at the time, as well as by the agent.<sup>3</sup>

Again, where A communicated to B a statement made to him by C, and cannot recollect its substance, C is a competent witness to prove it;<sup>4</sup> and one who overheard all but a small portion of a conversation may testify as to what was said.<sup>5</sup> So, also, it is no objection to the testimony of a witness who deposes to general reputation of pedigree, that he is not one of the family or intimately acquainted with it;<sup>6</sup> and persons are competent to prove the general correctness of plaintiff's day-book, who have settled their accounts by his ledger, which was posted from the day-book.<sup>7</sup> But a witness called to testify respecting a custom of trade who showed that his knowledge of it was not later than a year before the time of the trial, was held incompetent to prove what the custom was.<sup>8</sup>

§ 10. **Effect of Imperfect Recollection.**—The fact that a witness who is called to testify to the declarations of another cannot state the precise time or place, or the names of the persons present, goes only to his credibility, and not to the admissibility of his testimony;<sup>9</sup> and the fact that he cannot remember all that was said will not exclude his testimony of what he does remember;<sup>10</sup> it is sufficient if he is able to give the substance of what was said.<sup>11</sup> But a witness who *merely thinks* he could give the substance, perhaps, of a lost document, is not competent to prove its contents.<sup>12</sup>

In *Fulton v. Maccracken*,<sup>13</sup> the witness, on cross-examina-

<sup>1</sup> *Governor v. Roberts*, 2 Hawks (N. C.) 26.

<sup>2</sup> *Badger v. Story*, 16 N. H. 168.

<sup>3</sup> *Featherman v. Miller*, 45 Pa. St. 96.

<sup>4</sup> *Green v. Cawthorn*, 4 Dev. (N. C.) L. 409. *S. P. Curry v. Robinson*, 11 Ala. 266.

<sup>5</sup> *Davis v. Smith*, 75 N. C. 115; *Commonwealth v. Farley*, Thach. (Mass.) Cr. 654.

<sup>6</sup> *Banert v. Day*, 3 Wash. 243.

<sup>7</sup> *Stroud v. Tilton*, 4 Abb. (N. Y.)

App. Dec. 324. Compare *Smith v. Smith*, 1 Thomp. & C. (N. Y.) 63.

<sup>8</sup> *Hale v. Gibbs*, 43 Iowa, 380.

<sup>9</sup> *Walker v. Blassingame*, 17 Ala. 810.

<sup>10</sup> *Pond v. State*, 55 Ala. 196; *Wright v. State*, 35 Ark. 639.

<sup>11</sup> *Burson v. Huntington*, 21 Mich. 145. Compare *Black v. Woodrow*, 39 Md. 194; *State v. Hughes*, 29 La. Ann. 514.

<sup>12</sup> *Graham v. Chrystal*, 2 Abb. (N. Y.) App. Dec. 263.

<sup>13</sup> 18 Md. 528.

tion as to whether he had mailed certain notices, answered, "that he had no doubt he mailed them, but could not say he precisely remembered the distinct fact." It was held that this was competent evidence to go to the jury, and that the degree of its reliability was a question for their consideration. So, also, it has been decided that the testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory at times fails him in consequence of mental injury resulting from sunstroke, and that such is his present condition, is not to be stricken out by the presiding judge, but may be submitted to the jury.<sup>1</sup>

But the testimony of a person eighty years of age was held insufficient, upon an issue in chancery as to the fairness of a conveyance, his memory being too impaired to recollect whether he made alleged payments, amounting to \$1,300, in 1861, 1862, 1863, 1864, or 1865, or whether he got any of the money from the grantor, his son-in-law.<sup>2</sup>

<sup>1</sup> *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508.

<sup>2</sup> *McCutchen v. Pique*, 4 Heisk. (Tenn.) 565.



## CHAPTER II.

### OF MORAL DISQUALIFICATIONS.

- § 11. Defect of Religious Belief.
- § 12. Ascertaining Competency with Reference to Religious Belief.
- § 13. Statutory Abolition of Incompetency upon this Ground.
- § 14. Common Law Rule as to Infamous Persons.
- § 15. What constitutes Infamy.
- § 16. How Infamy may be proved.
- § 17. Effect of Foreign Judgment of Conviction.
- § 18. Effect of Conviction of Minor Offence.
- § 19. Removal of Incompetency by Pardon, Reversal of Judgment, or  
\* Expiration of Sentence.
- § 20. Abolition of the Disability by Statute.
- § 21. Accomplices.

§ 11. **Defect of Religious Belief.** — It being a rule of universal application that on all trials, civil or criminal, oral evidence must be given under the sanction of an oath (except in cases where, by statute, the substitution of a solemn affirmation is permitted), it naturally follows that one who, from defect of religious sentiment, is insensible to the obligation of an oath, ought not to be permitted, even if willing, to blasphemously invoke the name of a Supreme Being, in whose existence as “the rewarder of truth and avenger of falsehood,”<sup>1</sup> he does not believe.

<sup>1</sup> *Per* Lord Hardwicke, 1 Atk. 48. “The law is wise in requiring the highest attainable sanction for the truth of testimony given; and is consistent in rejecting all witnesses incapable of feeling this sanction, or of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity. It does not impute guilt or blame to either. If the witness is evidently intoxicated, he is not allowed to be sworn; because, for the time being, he is evidently incapable of feeling the force and obligation of an oath. The *non compos*, and the infant of tender age, are rejected for the

same reason, but without blame. The atheist is also rejected, because he, too, is incapable of realizing the obligation of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not to the cause, or the manner of avowal. Whether it be calmly insinuated with the elegance of Gibbon, or roared forth in the disgusting blasphemies of Paine, still it is atheism; and to require the mere formality of an oath, from one who avowedly despises, or is incapable of feeling, its peculiar sanction, would be but a mockery of justice.” 1 Law Reporter, pp. 346, 347.

Without such belief, one sanction, which the law regards as material security for truth, namely, the fear of Divine punishment invoked by the witness upon himself, is wanting. It does not suffice that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with the law of the most civilized countries, requires the additional security afforded by the religious sanction implied by an oath, and, as a necessary consequence, rejects all witnesses who are incapable of giving this security.<sup>1</sup>

Accordingly, it has been held in many cases that atheists *i.e.*, persons who do not believe in the existence of a God, *nor* in a future state of rewards and punishments, are not competent witnesses.<sup>2</sup> The test is, does the witness believe in God, and that He will punish him if he swears falsely?<sup>3</sup> And the great weight of authority, in this country, now is, that it is immaterial whether the witness believes God's vengeance will overtake him before or after death.<sup>4</sup>

<sup>1</sup> 1 Phill. Ev. (10 ed.) 19; Com. v. Winnemore, 2 Brews. (Pa.) 378.

<sup>2</sup> B. N. P. 292; Gilb. Ev. 129; 1 Stark. Ev. 22; 1 Atk. 40, 45; Wakefield v. Ross, 5 Mason (U. S.) 16; Curtiss v. Strong, 4 Day (Conn.) 51 (the case of a subscribing witness to a will); Atwood v. Welton, 7 Conn. 66; Central &c. R. R. Co. v. Rockafellow, 17 Ill. 541; Smith v. Coffin, 18 Me. 157; Thurston v. Whitney, 2 Cush. (Mass.) 104; Norton v. Ladd, 4 N. H. 444; Jackson v. Gridley, 18 Johns. (N. Y.) 98; People v. McGarren, 17 Wend. (N. Y.) 460; Scott v. Hooper, 14 Vt. 535; Arnold v. Arnold, 13 Id. 263.

<sup>3</sup> Orchimund v. Barker, Willes, 545; Butts v. Swartwood, 2 Cow. (N. Y.) 431; People v. Matteson, Id. 433, 573 *n.*; Cubbison v. McCreary, 2 Watts & S. (Pa.) 262.

<sup>4</sup> Noble v. People, 1 Ill. 29; Shaw v. Moore, 4 Jones (N. C.) L. 25; People v. Matteson, 2 Cow. (N. Y.) 432 *n.* (a);

Anonymous, Id. 572; Brock v. Milligan, 10 Ohio, 121; Blair v. Seaver, 26 Pa. St. 274; Jones v. Harris, 1 Strobb. (S. C.) 160; Bennett v. State, 1 Swan (Tenn.) 411; United States v. Kennedy, 3 McLean (U. S.) 175; Blocker v. Burness, 2 Ala. 354. The only cases found to the contrary are, Com. v. Bachelor, 4 Am. Jur. 81; Curtiss v. Strong, 4 Day (Conn.) 51; Atwood v. Welton, 7 Conn. 66; and Jackson v. Gridley, 18 Johns. (N. Y.) 98. In two of these, Curtis v. Strong, and Jackson v. Gridley, the point was not involved, as, in the first case, the witness did not believe in the obligation of an oath, and in the second he was a confirmed atheist, devoid of any religious principles whatever. As to the rule in Tennessee, see State v. Doherty, 2 Tenn. 80; State v. Cooper, Id. 96. See also Easterday v. Kilborn, 1 Wright (Ohio) 345, 346, where a witness said he did not believe in the existence of a God, but added that he saw God in trees,

If the witness believes in a Deity, whether the God of the Christians, or of the Jews, or a Heathen idol, he will be competent, and if not a Christian, the oath will be administered to him according to the form in use in his own country, as we shall see hereafter.<sup>1</sup>

**§ 12. Ascertaining Competency with Reference to Religious Belief.** — The law, in its charity, presumes that every one offered as a witness in a court of justice, believes in the existence of a Supreme Being, and upon him who seeks to exclude a witness, upon the ground of defect of religious belief, devolves the burden of proving the witness to be an unbeliever. The party adducing the witness may remain passive until his antagonist offers evidence of incompetency, and when this is done, he may support his witness by evidence upholding the presumption.<sup>2</sup>

The condition of the witness's religious belief at the time of the trial is the question, and this is presumed to be the common faith of the country, until the contrary is shown. This may be done and the competency of the witness impeached by proof of his declarations to others made previously to the trial.<sup>3</sup> But not, according to the weight of authority, by an examination of the witness himself;<sup>4</sup> still he will be permitted to explain his religious sentiments, if he desires so to do; and if he then declares that he believes in a future state of existence, and in a Supreme Being who will punish him either in this world or the next, for his evil deeds, the court will permit him to be examined as a witness, leaving his credi-

bushes, herbage, and everything he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and that an oath imposes no additional obligation. The court held these declarations equivalent to an avowal of belief in the existence of a God, and admitted the witness, Wright, J., saying, "He sees him in all created nature."

<sup>1</sup> *Infra*, § 235.

<sup>2</sup> *Swift's Ev.* 48; *Donnelly v. State*, 2 Dutch. (N. J.) 463, 601; *Smith v. Coffin*, 18 Me. 157.

<sup>3</sup> *Anderson v. Maberry*, 2 Heisk. (Tenn.) 653; *S. P. Bow v. Parsons*, 1 Root (Conn.) 480; *Beardsley v. Foot*,

2 Id. 390; but such evidence should be confined to a time not long before the trial, *Brock v. Milligan*, 10 Ohio, 126; and it was held in Maine, that evidence that a witness had stated "that he had lost his devotion, that he intended now to serve the devil as long as he had served the Lord, and that he had a pack of cards which he carried about in his pocket, and called them his Bible," was not admissible to discredit the witness, not conflicting with any statement of his. *Halley v. Webster*, 21 Me. 461.

<sup>4</sup> *Com. v. Smith*, 2 Gray (Mass.) 516; *Com. v. Batchelder*, Thach. (Mass.) Cr. 191.

bility to the jury.<sup>1</sup> It has been held to be error, to require a witness, objected to for defect of religious belief, to be examined on his *voir dire*, when he proposes to resort to proof *aliunde*.<sup>2</sup> And, on the other hand, after the witness's incompetency (on this ground) has been established by testimony, he cannot be sworn upon the *voir dire*, to restore his com-

<sup>1</sup> United States v. White, 5 Cranch, C. Ct. 38. See Commonwealth v. Winnemore, 1 Brews. (Pa.) 356.

<sup>2</sup> Odell v. Koppee, 5 Heisk. (Tenn.) 88; Com. v. Burke, 16 Gray (Mass.) 33. *Contra*, Harrel v. State, 1 Head (Tenn.) 125; Arnd v. Amling, 53 Md. 192, where a witness for plaintiff was objected to as incompetent on the ground that he had alleged his disbelief in God and in future punishment. He was sworn on his *voir dire*, and asked by the court whether he believed in God and future punishment, and he replied that he did. The court then offered the defendant the opportunity to contradict him, but the offer was declined, whereupon he was permitted to testify. See also Quinn v. Crowell, 4 Whart. (Pa.) 334; R. v. Serva, 2 Car. & K. 53, 56.

"The witness himself is never questioned in modern practice, as to his religious belief, though formerly it was otherwise (1 Swift's Dig. 739; 5 Mason, 19; American Jurist, vol. iv. 79, n.). It is not allowed, even after he has been sworn (The Queen's Case, 2 Brod. & B. 284). Not because it is a question tending to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief; but if he voluntarily does avow it, there is no reason why the avowal should not be proved, like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions have been subsequently changed, this change will generally, if not always, be provable in the same mode. (Atwood v. Welton, 7 Conn. 66; Curtis v. Strong,

4 Day (Conn.) 51; Swift's Ev. 48-50; Scott v. Hooper, 14 Vt. 535; Mr. Christian's note to 3 Bl. Comm. 369; 1 Phil. Ev. 18; Commonwealth v. Bachelor, 4 Am. Jur. 79, n.) If the change of opinion is very recent, this furnishes no good ground to admit the witness himself to declare it; because the greater inconvenience which would result from thus opening a door to fraud, than from adhering to the rule requiring other evidence of this fact. The old cases, in which the witness himself was questioned as to his belief, have on this point been overruled. See Christian's note to 3 Bl. Comm. [369] n. (30). The law, therefore, is not reduced to any absurdity in this matter. It exercises no inquisitorial power; neither does it resort to secondary or hearsay evidence. If the witness is objected to, it asks third persons to testify, whether he has declared his belief in God, and in a future state of rewards and punishments, &c. Of this fact, they are as good witnesses as he could be, and the testimony is primary and direct. It should further be noticed, that the question, whether a person about to be sworn is an atheist or not, can never be raised by any one but an adverse party. No stranger or a volunteer has a right to object. There must, in every instance, be a suit between two or more parties, one of whom offers the person in question as a competent witness. The presumption of law, that every citizen is a believer in the common religion of the country, holds good until it is disproved; and it would be contrary to all rule to allow any one, not party to the suit, to thrust in his objections to the course pursued by the litigants. This rule and uniform course of proceeding shows how much of the mor-

petency by his own declarations.<sup>1</sup> But stronger evidence is required to exclude a witness for defect of religious belief than is required to set aside a juror.<sup>2</sup>

§ 13. **Statutory Abolition of Incompetency upon this Ground.**—In many jurisdictions the objection of incompetency from the want of belief in the existence of a God is abolished by statute: this is the case in Arizona,<sup>3</sup> California,<sup>4</sup> Indiana,<sup>5</sup> Kentucky,<sup>6</sup> Maine,<sup>7</sup> Massachusetts,<sup>8</sup> Michigan,<sup>9</sup> Minnesota,<sup>10</sup> Mississippi,<sup>11</sup> Missouri,<sup>12</sup> Texas,<sup>13</sup> Vermont,<sup>14</sup> Virginia,<sup>15</sup> and Wisconsin.<sup>16</sup>

In others, the statute merely requires a belief in the *exist-*

bid sympathy expressed for the atheist is wasted. For there is nothing to prevent him from taking any oath of office; nor from swearing to a complaint before a magistrate; nor from making oath to his answer in chancery. In this last case, indeed, he could not be objected to for another reason; namely, that the plaintiff, in his bill, requests the court to require him to answer upon his oath. In all these, and many other similar cases, there is no person authorized to raise an objection. Neither is the question permitted to be raised against the atheist, where he himself is the adverse party, and offers his own oath, in the ordinary course of proceeding. If he would make affidavit, in his own cause, to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to the loss of a paper, or to the genuineness of his books of account, or to his fears of bodily harm from one against whom he requests surety of the peace, or would take the poor debtor's oath; in these and the like cases the uniform course is to receive his oath like any other person's. The law, in such cases, does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man seeking his own rights in a court of justice; and it conclusively and absolutely presumes that, so far as religious belief is concerned, all persons are capable of an oath, of whom it requires one, as the condition of its protection or

its aid; probably deeming it a less evil, that the solemnity of an oath should in few instances be mocked by those who feel not its force and meaning, than that a citizen should, in any case, be deprived of the benefit and protection of the law, on the ground of his religious belief. The state of his faith is not inquired into, where his own rights are concerned. He is only prevented from being made the instrument of taking away those of others." 1 Law Reporter, pp. 347, 348.

<sup>1</sup> *Commonwealth v. Wyman*, Thach. (Mass.) Cr. Cas. 432; *State v. Townsend*, 2 Harr. (Del.) 543.

<sup>2</sup> *McFadden v. Commonwealth*, 23 Pa. St. 12.

<sup>3</sup> Comp. L. 1877, p. 469.

<sup>4</sup> *Hittell's Code*, § 11,879; *Fuller v. Fuller*, 17 Cal. 605.

<sup>5</sup> Rev. Stat. 1881, § 505.

<sup>6</sup> *Bush v. Commonwealth*, 80 Ky. 244.

<sup>7</sup> Rev. Stat. 1871, § 81.

<sup>8</sup> Gen. Stat. ch. 131, § 12; Pub. Stat. 1882, ch. 169, § 18.

<sup>9</sup> Rev. Stat. 1846, ch. 102, § 96; *People v. Jenness*, 5 Mich. 305.

<sup>10</sup> Stat. 1878, p. 792, § 7.

<sup>11</sup> Rev. Code, 1880, § 1604.

<sup>12</sup> Rev. Stat. 1845, ch. 186, § 21; *Londoner v. Lichtenheim*, 11 Mo. App. 385.

<sup>13</sup> Rev. Stat. 1879, Art. 2249; Crim. Code, Art. 736.

<sup>14</sup> Rev. Stat. 1880, § 1007.

<sup>15</sup> *Perry's Case*, 3 Gratt. (Va.) 632.

<sup>16</sup> Const. Art. 1, § 18.

ence of a Supreme Being;<sup>1</sup> and in others still, the requirement is that the witness should believe in a God *who will punish false swearing*.<sup>2</sup>

In Georgia and Massachusetts, the decisions hold that this disbelief goes only to the *credibility* of the witness.<sup>3</sup> In several other states, where the statutory provision is that "all persons," or "every human being," or "every one who can understand an oath," shall be competent, it would seem that all disqualification by reason of defect of religious belief has been swept away.<sup>4</sup>

§ 14. **Common-Law Rule as to Infamous Persons.**—At common law, all persons convicted and sentenced for crimes ranked *infamous*, are thereby rendered incompetent to testify in any court of justice. "The basis of this rule is believed to be, that such a person is morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. Of such a person, Chief Baron Gilbert remarks, that the credit of his oath is overbalanced by the stain of his iniquity."<sup>5</sup> This disqualification extends to all cases where the declaration of the witness is to be used in a judicial proceeding for the purpose of establishing or proving some fact; and it applies to both written and oral evidence.<sup>6</sup> Thus, the admission of a felon that he wrote a certain letter, is incompetent to qualify the letter as a standard of comparison to prove handwriting;<sup>7</sup> and so positive is the law upon this subject, that a verdict will be set aside in a criminal case, where such a witness is permitted to testify, over objection, although he only said that he knew nothing of the crime, and was asleep at the time when it was charged to have been committed.<sup>8</sup>

<sup>1</sup> Conn. Rev. Stat. 1849, tit. 1, § 140; Ohio Rev. Stat. 1880 (2d ed.), § 5240; Gen. Stat. 1875, p. 440; N. Hamp. Tenn. Stat. 1871, § 3807.  
Rev. Stat. 1842, ch. 188, § 9; Gen. Laws, 1878, ch. 228, § 12.

<sup>2</sup> Mo. Rev. Stat. 1835, p. 419; 2 Ala. 17; Taylor v. State, 62 Ala. 164.  
N. Y. Rev. Stat. (3d ed.) p. 505.

<sup>3</sup> Donkle v. Kohn, 44 Ga. 266; Hunscom v. Hunscom, 15 Mass. 184. See  
also Com. v. Buzzell, 16 Pick. (Mass.) 153.

<sup>4</sup> Iowa Rev. Code, 1880, § 3636; But see State v. Killet, 2 Bail. (S. C.) 289.

<sup>5</sup> 1 Greenl. Ev. § 372; Gilb. Ev. by Lofft, p. 256; Sylvester v. State, 71

Ala. 17; Taylor v. State, 62 Ala. 164.  
<sup>6</sup> People v. Robertson, 26 How. (N. Y.) Pr. 90; In re Sawyer, 2 Q. B. 721; Webster v. Mann, 56 Tex. 119.

<sup>7</sup> Long v. State, 10 Tex. App. 186.

<sup>8</sup> State v. Mullen, 33 La. Ann. 159.

But it must be borne in mind, that nothing short of a judgment of conviction will render a person *infamous*: mere immorality,<sup>1</sup> or even guilt of the most heinous offence, confessed or established by the verdict of a jury, but not shown to have been followed by the judgment and sentence of a competent tribunal, will not have that effect. Such matters, however they may affect the credibility of the witness, do not in any way tend to render him incompetent, as we shall presently see.<sup>2</sup> Still, this rule of the common law, like all other similar regulations, is subject to some exceptions arising from necessity; thus, where the disqualified person is a party to the controversy, he may make any affidavit necessary for his defence, or for relief against an irregular judgment, for otherwise he would be remediless.<sup>3</sup> But it has been held that his affidavit is not admissible in support of a charge of crime.<sup>4</sup> In one case it was held that, having been a subscribing witness to a sealed instrument before his conviction, his handwriting might be proved, as though he were dead.<sup>5</sup>

§ 15. **What constitutes Infamy.**—It is probably impossible to designate with precision what constitutes *infamy* in the sense here used, or what acts will render a person *infamous*, and consequently incompetent to become a witness. Mere immorality will not.<sup>6</sup> According to Sir William Scott, “the *publicum judicium* must be upon an offence, implying such a dereliction of moral principle as carries with it a conclusion of a total disregard to the obligation of an oath.”<sup>7</sup> But what are the offences which do this? what is the least criminal of them? The more usual definition is *treason*, *felony*, and

<sup>1</sup> *Smithwick v. Evans*, 24 Ga. 461; *Jones v. State*, 13 Tex. 168.

<sup>2</sup> *Infra*, § 16. See also 2 Dods. 186; *Blaufus v. People*, 69 N. Y. 107; *Brown v. State*, 18 Ohio St. 496.

<sup>3</sup> *Davis & Carter's Case*, 2 Salk. 461; *Rex v. Gardner*, 2 Burr. 1117; *Skinner v. Perot*, 1 Ashm. (Pa.) 57. Under this exception; a party seeking to recover the amount of a lost bond, though he is infamous, is competent to make affidavit of the truth of the facts alleged in his bill. *Ritter v. Stutts*, 8 Ired. (N. C.) Eq. 240. See also *Donohoe v. People*, 56 N. Y. 208.

<sup>4</sup> *Rex v. Gardner*, *supra*; *Walter v. Kearney*, 2 Str. 1148; *Perez v. State*, 10 Tex. App. 327.

<sup>5</sup> *Jones v. Mason*, 2 Str. 833. But in Massachusetts it is held that evidence of the testimony of a witness in a former trial, who has since been convicted of an infamous crime, is inadmissible. *Le Baron v. Crombie*, 14 Mass. 234.

<sup>6</sup> *State v. Randolph*, 24 Conn. 363; *Smithwick v. Evans*, 24 Ga. 461; *Craft v. State*, 3 Kan. 450; *Jones v. State*, 13 Tex. 168.

<sup>7</sup> 2 Dods. 186.

the different species of the *crimen falsi*; but here we meet with the same difficulty; for while the first of these terms is easily defined, the second is not, and the offences included within the third and last have never been enumerated with precision. It will not do to look to the Roman law, from which the term *crimen falsi* is borrowed, and which defines it to include not only forgery, but also every other species of fraud and deceit,<sup>1</sup> because, at common law, many of the offences which, under the Roman law were included within the term, have never been deemed *infamous* in the sense here used; among these were false representations as to the quality of provisions, using false weights and measures, fraudulently conspiring to circulate false news, etc. On the other hand, the common law includes within the term, several offences which not only involve the charge of falsehood, but tend to hamper the due administration of justice, by the introduction of falsehood and fraud. Thus it is laid down that infamous crimes are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and offences affecting the public administration of justice.<sup>2</sup> But it has been held in Vermont, that an attempt to procure the absence of a witness, duly subpœnaed, in a criminal case, is not an infamous offence.<sup>3</sup>

§ 16. **How Infamy may be proved.**—As we have already seen,<sup>4</sup> neither bad character nor a charge of crime, even though substantiated by the verdict of a trial jury, will suffice to prove infamy. There must be a judgment of conviction pronounced by a court of competent jurisdiction;

<sup>1</sup> See 1 Greenl. Ev. (14th ed.) § 373, n.

<sup>2</sup> Schuylkill v. Copely, 67 Pa. St. 386; People v. Whipple, 9 Cow. (N. Y.) 707.

<sup>3</sup> State v. Keyes, 8 Vt. 57. Such an offence is held to be merely a contempt of court. Com. v. Feely, 2 Va. Cas. 1; Haskett v. State, 51 Ind. 176. But see Clancey's Case, Fortesc. 208; Bushel v. Barrett, Ry. & M. 434.

The following have been held to be infamous crimes: *Burglary*. Taylor v. State, 62 Ala. 164; People v. Park, 41 N. Y. 21. *Barratry*. Rex v. Ford, 2 Salk. 690. *Conspiracy to defraud creditors*. United States v. Porter, 2 Cranch, C. C. 60. *Forgery*. Poage v.

State, 3 Ohio St. 229; Rex v. Davis, 5 Mod. 74. *Grand larceny*. Taylor v. State, 62 Ala. 164. *Petit larceny, or theft*. Sylvester v. State, 71 Ala. 17; State v. Gardner, 1 Root (Conn.) 485; Com. v. Keith, 8 Metc. (Mass.) 531. But see Free v. State, 1 McMull. (S. C.) 494; Pendock v. Mackinder, Willes, 665. See also James v. Bostwick, 1 Wright (Ohio) 142, 143. *Receiving stolen goods*. Com. v. Rogers, 7 Metc. (Mass.) 500. As to *assaults*, see United States v. Brockins, 3 Wash. (U. S.) 99; and as to minor offences, generally, see *infra*, § 18.

<sup>4</sup> *Supra*, § 14.



nothing short of this will be received as legal and conclusive evidence of guilt, so as to render the witness incompetent.<sup>1</sup> The reason of this rule is, that a mere verdict may be set aside, or a motion in arrest of judgment granted.<sup>2</sup> The evidence of guilt in all such cases goes only to the *credibility* of the witness, not to his competency.<sup>3</sup>

But while a sentence is essential, it is not the nature of the punishment, but of the crime for which the sentence is imposed, which renders the party infamous.<sup>4</sup>

In proof of his infamy, the witness himself cannot be questioned, provided objection be made; but the fact must be shown by the record of his conviction (or, in proper cases, by an authentication of the record); no other proof will suffice.<sup>5</sup>

§ 17. **Effect of Foreign Judgment of Conviction.**— Upon this branch of the subject the adjudged cases are not harmonious; but a careful scrutiny of them cannot fail to satisfy the reader that the true rule, supported by an overwhelming weight of authority is, that the record of a foreign judgment of conviction (and in the term “foreign” the judgments of courts of sister States are included) ought not to be received in evidence on the question of the *competency* of the witness, however much such evidence may (as it undoubtedly will) affect the

<sup>1</sup> United States v. Dickenson, 2 McLean (U. S.) 325; People v. Whipple, 9 Cow. (N. Y.) 707; Blaufus v. People, 69 N. Y. 107. See also Dawley v. State, 4 Ind. 128; State v. Valentine, 7 Ired. (N. C.) L. 225; State v. Anderson, 5 Harr. (Del.) 493; People v. Herrick, 13 Johns. (N. Y.) 82; Cushman v. Loker, 2 Mass. 108; Jackson v. Osborn, 2 Wend. (N. Y.) 555; Skinner v. Perot, 1 Ashm. (Pa.) 57.

<sup>2</sup> But see Kehoe v. Com., 85 Pa. St. 127.

<sup>3</sup> People v. Herrick, 13 Johns. (N. Y.) 82; Wicks v. Smalbrook, 1 Sid. 51; s. c., T. Raym. 32.

<sup>4</sup> Batholomew v. People, 104 Ill. 601; People v. Whipple, 9 Cow. (N. Y.) 707; People v. Park, 41 N. Y. 21; *affirming* 1 Lans. 263, in which latter case an infant, convicted of burglary, was, under the statute as to juvenile delinquents, sentenced to the house of

refuge instead of to the state prison. The court held him incompetent on the ground of infamy.

<sup>5</sup> United States v. Biebusch, 1 Fed. Rep. 213; s. c., 1 McCrary, 42; People v. Herrick, 13 Johns. (N. Y.) 82; Hiltz v. Colvin, 14 Johns. (N. Y.) 182; Cooper v. State, 7 Tex. App. 194; Perez v. State, 8 Id. 610, and again in 10 Id. 327, where the court hold that the fact of infamy must be shown by the best evidence, or a proper foundation laid for the introduction of secondary evidence of the fact. The cases of State v. Ridgely, 2 Harr. & M. (Md.) 120, and Clarke v. Hall, Id. 378, are not authority to the contrary, for in these cases parol evidence was admitted merely to prove that the witnesses had been transported from Great Britain to Maryland *prior to the Revolution*.

*credibility* of his testimony. The disqualification is a purely personal one; it has its origin in positive law; is not founded upon natural law; and being of a penal character, must be strictly construed.<sup>1</sup>

In a few jurisdictions, however, it has been held that a foreign judgment of conviction will disqualify.<sup>2</sup>

Whether a conviction in another State was of a crime infamous or not, is to be determined by the law of the forum; the transcript of the record should therefore set out the indictment, that the court may determine this point.<sup>3</sup>

§ 18. **Effect of Conviction of Minor Offence.**—We have already seen that at common law, all crimes were not deemed infamous, and that it was the infamy of the crime, and not the nature or mode of punishment, that rendered the person convicted incompetent as a witness.<sup>4</sup> There are many offences involving both falsehood and fraud, which are punished as infamous crimes are usually punished, and yet are not infamous crimes, and will not exclude the offenders as witnesses.<sup>5</sup> Among these minor offences are: adultery;<sup>6</sup> conspiracy to cheat and defraud creditors;<sup>7</sup> dealing faro;<sup>8</sup> embezzlement by a public officer;<sup>9</sup>

<sup>1</sup> Commonwealth v. Green, 17 Mass. 515; National Trust Co. v. Roberts, 42 N. Y. Superior, 100; Sims v. Sims, 75 N. Y. 466; reversing s. c., 12 Hun, 231; National Trust Co. v. Gleason, 77 N. Y. 400. Thus, it is held in Alabama, that a conviction for libel in another State will not disqualify, Campbell v. State, 23 Ala. 44; nor will a foreign conviction of petty larceny so operate in Virginia, Uhl v. Commonwealth, 6 Gratt. (Va.) 706; what effect it will have in Louisiana, see Klein v. Dinkgrave, 4 La. Ann. 540. In New Hampshire, it is held that a conviction of a crime in another State is not admissible in evidence for the purpose of impeaching the credit of a witness. But a conviction in another State of a crime which, by the laws of such State, disqualifies the party from being heard as a witness, and which, if committed in New Hampshire, would have operated as a disqualification, is sufficient to exclude him from testifying there, in the same manner as if it had

been committed, and the conviction had taken place in New Hampshire. Chase v. Blodgett, 10 N. H. 22.

<sup>2</sup> State v. Foley, 15 Nev. 64; s. c., 37 Am. Rep. 458; State v. Chandler, 3 Hawks (N. C.) 393 (one of the three judges doubting). The cases of Cole v. Cole, 1 Har. & J. (Md.) 572; State v. Ridgely, 2 Harr. & M. (Md.) 120; and Clarke v. Hall, Id. 378, are not in point, as in those cases the judgments of conviction were not foreign ones, having been pronounced in England prior to the Revolution.

<sup>3</sup> Kirschner v. State, 9 Wis. 140.

<sup>4</sup> *Supra*, § 16.

<sup>5</sup> Schuyllkill v. Copeley, 67 Pa. St. 386; United States v. Brockins, 3 Wash. (U. S.) 99; Clarke v. Hall, 2 Harr. & M. (Md.) 378.

<sup>6</sup> Little v. Gibson, 39 N. H. 505.

<sup>7</sup> Bickel v. Fasig, 33 Pa. St. 463.

<sup>8</sup> Holloway v. Com., 11 Bush (Ky.) 344.

<sup>9</sup> Schuyllkill v. Copeley, *supra*.

keeping a bawdy-house;<sup>1</sup> maliciously obstructing the passage of cars on a railroad;<sup>2</sup> obtaining goods by false pretences;<sup>3</sup> petit larceny;<sup>4</sup> receiving stolen goods;<sup>5</sup> unlawfully cutting timber;<sup>6</sup> violating a city ordinance;<sup>7</sup> and many others; but in the case of most of them the conviction may be shown for the purpose of impeaching the credibility of the witness.

§ 19. **Removal of Incompetency by Pardon, Reversal of Judgment, or Expiration of Sentence.** — The disability of infamy may be removed: (1) by a pardon; (2) by reversal of the judgment; and, at least in one State,<sup>8</sup> (3) by the expiration of the sentence, the convict having suffered the full punishment inflicted upon him.

While the rule is a general one, that a pardon, regularly granted, completely removes the disability;<sup>9</sup> yet where a statute, in express terms, annexes the disability to the conviction, a pardon will not remove it.<sup>10</sup> Thus, a conviction for perjury, under the statute, disqualifies, notwithstanding the offender be pardoned.<sup>11</sup>

<sup>1</sup> *Deer v. State*, 14 Mo. 348.

<sup>2</sup> *Com. v. Dame*, 8 Cush. (Mass.) 384.

<sup>3</sup> *Utley v. Merrick*, 11 Metc. (Mass.) 302.

<sup>4</sup> *Pruit v. Miller*, 3 Ind. 16; *Carpenter v. Nixon*, 5 Hill (N. Y.) 260; *Shay v. People*, 22 N. Y. 317; s. c., 4 Park. Cr. 353; *Welsh v. State*, 3 Tex. App. 114. *Contra*, *Lyford v. Farrar*, 31 N. H. 314, and cases cited in note to section 15, *supra*.

<sup>5</sup> *Com. v. Murphy*, 3 Pa. L. J. Rep. 290.

<sup>6</sup> *Koller v. Pfrth*, 2 Penn. (N. J.) 723.

<sup>7</sup> *Cheatham v. State*, 59 Ala. 40.

<sup>8</sup> West Virginia.

<sup>9</sup> *United States v. Rutherford*, 2 Cranch, C. C. 528; *Yarborough v. State*, 41 Ala. 405; *Klein v. Dinkgrave*, 4 La. Ann. 540; *Baum v. Clause*, 5 Hill (N. Y.) 196; and even though the charter of pardon incorrectly states the date of the conviction, it is sufficient, if it be possible to show that it was intended to cover, and does cover, the offence of which the record shows the witness to be

guilty. *Com. v. Ohio &c. R. R. Co.*, 1 Grant (Pa.) Cas. 329. But see *Evans v. State*, 7 Baxt. (Tenn.) 12.

<sup>10</sup> *Foreman v. Baldwin*, 24 Ill. 298.

<sup>11</sup> *Houghtaling v. Kelderhouse*, 1 Park. (N. Y.) Cr. 241; *Rex v. Ford*, 2 Salk. 690; *Dover v. Maestaer*, 5 Esp. 92, 94. "Although the incapacity to testify, especially considered as a mark of infamy, may really operate as a severe punishment upon the party, yet there are other considerations affecting other persons which may well warrant his exclusion from the halls of justice. It is not consistent with the interests of others, nor with the protection which is due to them from the State, that they should be exposed to the peril of testimony from persons regardless of the obligation of an oath; and hence, on grounds of public policy, the legislature may well require that, while the judgment itself remains unreversed, the party convicted shall not be heard as a witness. It may be more safe to exclude in all cases than to admit in all, or attempt to distinguish by investigating the grounds on which the

Even though the pardon be granted after the convict has suffered the entire punishment imposed upon him, it will rehabilitate him.<sup>1</sup> The convict becomes competent to testify notwithstanding a clause in the pardon declaring that nothing contained therein is intended to relieve the prisoner from the legal disabilities arising from his conviction and sentence, but solely from imprisonment; such clause is repugnant, and will be treated as surplusage.<sup>2</sup> To prove the pardon, the charter of pardon, under the great seal of the State, must be produced.<sup>3</sup>

The reversal of the judgment of conviction will in all cases restore competency; for in such event there is no conviction and consequently no infamy. The fact of reversal must be shown in the same manner as the judgment of conviction is shown, viz., by production of the record of reversal, or an exemplification thereof, in cases where the latter course is permissible.

pardon may have been granted. And it is without doubt as clearly within the power of the legislature to modify the law of evidence by declaring what manner of persons shall be competent to testify, as by enacting, as in the Statute of Frauds, that no person shall be heard *viva voce* in proof of a certain class of contracts. The statute of Elizabeth itself seems to place the exception on the ground of a rule of evidence, and not on that of a penal fulmination against the offender. The intent of the legislature appears to have been not so much to punish the party, by depriving him of the privilege of being a witness or a juror, as to prohibit the courts from receiving the oath of any person convicted of disregarding its obligation. And whether this consequence of the conviction be entered on the record or not, the effect is the same. The judgment, under the statute, being properly shown to the judges of a court of justice, their duty is declared in the statute independent of the insertion of the inhibition as part of the sentence, and unaffected by any subsequent pardon. The legislature, in the exercise of its power to punish crime, awards fine, imprisonment, and the

pillory against the offender; in the discharge of its duty to preserve the temple of justice from pollution, it repels from its portal the man who feareth not an oath. Thus it appears that a man convicted of perjury cannot be sworn in a court of justice while the judgment remains unreversed, though his offence may have been pardoned after the judgment; but the reason is found in the express direction of the statute to the courts, and not in the circumstance of the disability being made a part of the judgment. The pardon exerts its full vigor on the offender, but is not allowed to operate beyond this, upon the rule of evidence enacted by the statute. The punishment of the crime belongs to the criminal code, the rule of evidence to the civil."—See *Amer. Jur.*, vol. xi., pp. 360-362.

<sup>1</sup> *State v. Blaisdell*, 33 N. H. 388; *United States v. Jones*, 2 Wheel. Cr. Cas. 451.

<sup>2</sup> *People v. Pease*, 3 Johns. (N. Y.) Cas. 333.

<sup>3</sup> *State v. Blaisdell*, 33 N. H. 388; *Cooper v. State*, 7 Tex. App. 194. A witness shown by production of the record to have been convicted of felony and sentenced for a term yet

In West Virginia, it is held that where a convict has undergone the punishment of imprisonment in the penitentiary under his sentence, the statute restores to him competency as a witness. And the fact of his being at liberty after the length of time for which he was sentenced, is *prima facie* evidence that he has suffered the punishment.<sup>1</sup>

§ 20. **Abolition of the Disability by Statute.**—In a large number of the States, statutory changes in the law have wholly abolished the doctrine of incompetency by reason of conviction of crime, however infamous, leaving the fact of such conviction to be considered by the jury upon the sole question of the credibility of the witness. Such is the present state of the law in California,<sup>2</sup> Colorado,<sup>3</sup> Connecticut,<sup>4</sup> Delaware,<sup>5</sup> Georgia,<sup>6</sup> Illinois,<sup>7</sup> Indiana,<sup>8</sup> Iowa,<sup>9</sup> Kansas,<sup>10</sup> Maine,<sup>11</sup> Massachusetts,<sup>12</sup> Michigan,<sup>13</sup> Minnesota,<sup>14</sup> Missouri,<sup>15</sup> New Hampshire,<sup>16</sup> New Jersey,<sup>17</sup> New York,<sup>18</sup> North Carolina,<sup>19</sup> Rhode Island,<sup>20</sup> Vermont,<sup>21</sup> Virginia,<sup>22</sup> and Wisconsin.<sup>23</sup>

unexpired, and so disqualified, will not be presumed to have been pardoned merely because he is in attendance and apparently at large, but may be interrogated whether he has received a pardon. *Schell v. State*, 2 Tex. App. 30.

<sup>1</sup> *State v. Williams*, 14 W. Va. 851. Compare *State v. Connor*, 7 La. Ann. 379. To the contrary, see *United States v. Brown*, 4 Cranch, C. C. 607; and see also *State v. Benoit*, 16 La. Ann. 273. The fact that sentence has been suspended, pending an appeal, will not render the convicted person competent. *Rittar v. Democratic Press Co.*, 68 Mo. 458. And one who has been convicted, but has not paid his fine, is not a competent witness for his co-defendant. *Ellege v. State*, 24 Tex. 78.

<sup>2</sup> Hittell's Code, § 11,879.

<sup>3</sup> Gen. Laws, 1877, ch. 104.

<sup>4</sup> Rev. Stat. 1849, tit. 1, § 141; Gen. Stat. 1875, p. 440.

<sup>5</sup> Laws 1874, p. 652.

<sup>6</sup> Code 1882, § 3854. See also *Frain v. State*, 40 Ga. 529.

<sup>7</sup> Rev. Stat. 1880, p. 505, § 1; *Eartholomew v. People*, 104 Ill. 601.

<sup>8</sup> Code, § 243; *Glenn v. Clore*, 42 Ind. 60.

<sup>9</sup> Code 1851, art. 2388; Rev. Code 1880, § 3636.

<sup>10</sup> Comp. Laws 1879, § 3847.

<sup>11</sup> Laws 1861, ch. 53; *Woodman v. Churchill*, 51 Me. 112.

<sup>12</sup> Gen. Stat. ch. 131, § 13; Pub. Stat. ch. 169, § 18; Laws 1852, ch. 312, § 60. *Newhall v. Jenkins*, 2 Gray (Mass.) 562.

<sup>13</sup> Rev. Stat. 1846, ch. 102, § 99; Laws 1861, ch. 125, p. 118.

<sup>14</sup> Stat. 1878, p. 792, § 7.

<sup>15</sup> See *United States v. Biebusch*, 1 Fed. Rep. 213; s. c., 1 McCrary, 42.

<sup>16</sup> Gen. Laws 1878, ch. 228, § 27.

<sup>17</sup> Rev. p. 378, § 1.

<sup>18</sup> Laws 1869, ch. 678; Code Civ. Pro. § 832; *Delamater v. People*, 5 Lans. (N. Y.) 332; *Donohoe v. People*, 56 N. Y. 208; *National Trust Co. v. Gleason*, 77 N. Y. 400; *Perry v. People*, 86 N. Y. 353; s. c., 62 How. Pr. 148; *People v. McGloin*, 91 N. Y. 241.

<sup>19</sup> Batt. Rev. 1873, p. 388, § 14; *State v. Harston*, 63 N. C. 294.

<sup>20</sup> Pub. Stat. 1882, ch. 214, § 38.

<sup>21</sup> Rev. Stat. 1880, § 1008.

<sup>22</sup> *Johnson's Case*, 2 Gratt. (Va.) 581.

<sup>23</sup> Rev. Stat. 1878, § 4073; *Sutton v. Fox*, 55 Wis. 531.

In a few States an exception is made in the case of a person convicted of perjury; such person not being permitted to testify, even though he has received a pardon, or has suffered the full punishment provided by law for the offence. Among these States are Florida,<sup>1</sup> Maryland,<sup>2</sup> Mississippi,<sup>3</sup> and South Carolina.<sup>4</sup>

In Arkansas, consent of the parties is essential to the admissibility of the testimony of a person convicted of one of the higher grades of crime.<sup>5</sup> In Tennessee, such persons are incompetent until restored to full rights of citizenship, in accordance with the law provided for that purpose.<sup>6</sup> In Texas, the reversal of the judgment (if for felony) or a pardon is essential, and in the case of perjury, even a pardon will not rehabilitate the witness.<sup>7</sup>

§ 21. **Accomplices.**—The doctrine of the common law which forbids the reception of accomplice testimony, seems to be founded upon the interest of the witness in the event of the trial, rather than upon his disqualification from a moral standpoint. These witnesses generally testify against their confederates, under an understanding, express or implied, that their aid in bringing the principal offender to justice will secure to themselves, either absolute immunity, or at least a considerable mitigation of the severity of the punishment which would, in the nature of things, be meted out to them in case they did not so testify. For this reason the competency of this class of witnesses will be treated more fully when we come to consider the disqualification of interest.<sup>8</sup> But it is proper to state in this place, that however heinous his guilt may be, an accomplice or accessory, even though indicted, who has not been convicted and sentenced for an infamous crime, is not, on the ground of infamy, an incompetent witness.

In many cases the principal offender could not be convicted without the testimony of the *particeps criminis*, and it is this fact which justifies his admission to testify.<sup>9</sup>

<sup>1</sup> Thomp. Dig. pp. 334, 335; Dig. of Laws, 1881, p. 518.

<sup>2</sup> Rev. Code 1878, p. 749, § 1.

<sup>3</sup> Rev. Code 1880, § 1000.

<sup>4</sup> Gen. Stat. 1882, § 2532.

<sup>5</sup> Dig. of Stat. 1874, § 24.

<sup>6</sup> Stat. 1871, § 3812.

<sup>7</sup> Code Crim. Pro. art. 730.

<sup>8</sup> *Infra*, § 42.

<sup>9</sup> *United States v. Lancaster*, 2 McLean (U. S.) 431; *United States v. Troax*, 3 Id. 224; *United States v. Henry*, 4 Wash. (U. S.) 428; *Marler v. State*, 67 Ala. 55; s. c., 68 Id. 580; *Solander v. People*, 2 Col. T. 48; *State v. Shields*, 45 Conn. 256; *Gray v. Peo-*

In a recent New York case it is laid down that an accomplice is competent to testify, regardless of the extent of his own guilt, even though it may exceed that of the principal defendant, and that it lies in the discretion of the trial court whether or not to admit him as a witness.<sup>1</sup> A few cases decide that an accomplice *who has not been indicted* is competent;<sup>2</sup> but the great weight of authority raises no distinction between accomplices who have been, and those who have not been *indicted*, but rather between those who have and those who have not been *convicted and sentenced*.<sup>3</sup>

In most of the cases just cited the accomplice was offered as a witness for the prosecution. Upon the question of his competency for the defence, the authorities are not harmonious; but the better opinion seems to favor his admission, where the evidence against him is slight; and the court, in such cases, will generally direct his acquittal, and then admit him to testify; or a *nolle prosequi* as to him may be entered by the prosecutor with the consent of the court.<sup>4</sup> But it seems to be pretty well settled that, unless he be acquitted, or a *nolle* entered, he will not be competent to testify in favor of the principal offender, or his other co-partners in guilt.<sup>5</sup> And there are many respectable adjudications which expressly deny to the accessory or accomplice the right to testify in favor of the principal.<sup>6</sup>

ple, 26 Ill. 344; Earll v. People, 73 Ill. 329; Johnson v. State, 2 Ind. 652; Ayers v. State, 88 Ind. 275; State v. Cook, 20 La. Ann. 145; Moulton v. Moulton, 13 Me. 110; Sinclair v. Jackson, 47 Me. 102; Territory v. Corbett, 3 Mont. T. 50; People v. Whipple, 9 Cow. (N. Y.) 707; People v. Costello, 1 Den. (N. Y.) 83; People v. Lohman, 2 Barb. (N. Y.) 216; Noland v. State, 19 Ohio, 131.

<sup>1</sup> Lindsay v. People, 63 N. Y. 143.

<sup>2</sup> Phillips v. State, 34 Ga. 502; Sumpter v. State, 11 Fla. 247; McKenzie v. State, 24 Ark. 636.

<sup>3</sup> Cases first cited, *supra*.

<sup>4</sup> State v. Graham, 12 Vr. (N. J.) 15. S. P. United States v. Hanway, 2 Wall, Jr. 139; People v. Labra, 5 Cal. 183.

<sup>5</sup> Armistead v. State, 18 Ga. 704; People v. Bill, 10 Johns. (N. Y.) 95;

State v. Carr, Cox (N. J.) 1; State v. Weir, 1 Dev. (N. C.) L. 363; State v. Mooney, 1 Yerg. (Tenn.) 431; Myers v. State, 3 Tex. App. 8; s. c., Id. 321. Whether he can so testify after having been *convicted*, see State v. Stotts, 26 Mo. 307; Garrett v. State, 6 Mo. 1; Campbell v. Commonwealth, 2 Va. Cas. 314; State v. Turner, 1 Del. Cr. Rep. 76. If the judgment is for a fine merely, and he has paid the fine, he may testify. 2 Russ. Cr. 597, 600; R. v. Wislbeer, 1 Leach, C. C. 14; R. v. Fletcher, 1 Str. 633.

<sup>6</sup> Collier v. State, 20 Ark. 36; State v. Calvin, R. M. Charlt. (Ga.) 151. Right of the principal offender to testify against the accessory on the separate trial of the latter, see Keech v. State, 15 Fla. 591; People v. Whipple, 9 Cow. (N. Y.) 707; Noland v. State, 19 Ohio, 131.

## CHAPTER III.

### OF SOCIAL DISQUALIFICATIONS.

§ 22. Indians.

§ 23. Negroes and Slaves.

§ 24. Chinamen.

§ 22. **Indians.**—It has been held in Indiana, that although an Indian is not a competent witness in that State, yet the fact that a witness is principal chief of an Indian nation, is, at most, but presumptive evidence that he is an Indian, which, in the Supreme Court, is rebutted by the fact that he was admitted to testify in the Circuit Court.<sup>1</sup> The same rule of incompetency was adopted in California.<sup>2</sup> In Mississippi, however, an Indian is conceded to be a competent witness in a suit between white men, and is under no other restrictions than a white person.<sup>3</sup> So, also, in Nebraska, the only test of an Indian's incompetency, so far as the fact of his being an Indian is concerned, is his capacity to understand and feel the obligation of an oath.<sup>4</sup>

§ 23. **Negroes and Slaves.**—During the existence of the institution of slavery in this country, and even after its abolition, and prior to the going into effect of the act of Congress commonly called the "Civil Rights Bill," it was the settled law in the slave States that persons having more than one-fourth (in some jurisdictions one-eighth) negro blood in their veins were incapable of becoming witnesses in any action, civil or criminal, in which a white person was a party in interest.<sup>5</sup> But the rule did not generally apply where both

<sup>1</sup> *Harris v. Doe*, 4 Blackf. (Ind.) 369.

<sup>2</sup> *People v. Howard*, 17 Cal. 63.

<sup>3</sup> *Coleman v. Doe*, 4 Sm. & M. 40; *Doe v. Newman*, 3 Sm. & M. 565.

<sup>4</sup> *Priest v. State*, 10 Neb. 393; s. c., 6 N. W. Rep. 468.

<sup>5</sup> *Smyth v. Oliver*, 31 Ala. 39; *Dupree v. State*, 33 Id. 380; *Heath v. State*, 34 Id. 250; *Brown v. Lester*,

Ga. Dec. Pt. I. 77; *Graham v. Crockett*, 18 Ind. 119; *Nave v. Williams*, 22 Id. 368; *Rusk v. Sowerwine*, 3 Har. & J. (Md.) 97; *Sprigg v. Negro Mary*, Id. 491; *Hughes v. Jackson*, 12 Md. 450; *Page v. Carter*, 8 B. Mon. (Ky.) 192; *Jordan v. Smith*, 14 Ohio, 199; *Dean v. Commonwealth*, 4 Gratt. (Va.) 541.



parties, the proceeding being of a civil nature, were negroes, or where the defendant, the action being a criminal one, was a negro.<sup>1</sup> And even where a white person was a party, the rule had some exceptions: thus, in such a case a negro was admitted to prove his book of original entries in order to make it evidence;<sup>2</sup> and the confession of a white man on trial for a crime was allowed to be proved by a colored witness.<sup>3</sup> Again, it was held competent to show that certain acts were done in consequence of information received from a negro;<sup>4</sup> and a conversation between the prisoner (a white man) and a negro was allowed to be proved, but only by a white witness.<sup>5</sup> Another exception was where the negro offered as a witness was the person injured by the crime for which a white man was put on trial. Thus it was held in Delaware that the negro on whom the assault and battery charged in the indictment was committed was competent on the trial of the prosecution for such assault against a white man, although there was a white witness present when it was committed.<sup>6</sup> And the same principle was applied in the case of a negro who had been kidnapped by a white man.<sup>7</sup>

In some cases the witness, if a free negro, was permitted to testify even against a white antagonist;<sup>8</sup> in others he was not,<sup>9</sup> but only where both parties were colored.<sup>10</sup> Color alone was not, however, deemed sufficient proof of incompetency; thus a dark-colored native of Turkey was held competent in the absence of proof of African descent.<sup>11</sup>

Upon the enactment of the Civil Rights Bill this absurdly unjust rule of evidence was utterly abrogated. This act of Congress is paramount as to the competency of witnesses, and must prevail where its provisions come in contact with

<sup>1</sup> *Elliott v. Morgan*, 3 Harr. (Del.) 316; *Woodward v. State*, 6 Ind. 492. *Contra*, *Gray v. State*, 4 Ohio, 353; *Jones v. State*, 1 Meigs (Tenn.) 120.

<sup>2</sup> *Webb v. Pindergrass*, 4 Harr. (Del.) 439.

<sup>3</sup> *State v. Downham*, 1 Del. Cr. 45.

<sup>4</sup> *Grady v. State*, 11 Ga. 253.

<sup>5</sup> *Hawkins v. State*, 7 Mo. 190. Compare *Ragland v. Huntingdon*, 1 Ired. (N. C.) L. 561.

<sup>6</sup> *State v. Rash*, 1 Del. Cr. 271.

<sup>7</sup> *State v. Whitaker*, 3 Harr. (Del.) 549; *State v. Griffin*, Id. 560. To the

contrary, see *People v. Howard*, 17 Cal. 63.

<sup>8</sup> *Ivey v. Hardy*, 2 Port. (Ala.) 548; *Potts v. Harper*, 2 Penn. (N. J.) 1030; *Gurnee v. Dessies*, 1 Johns. (N. Y.) 508.

<sup>9</sup> *Rusk v. Sowerwine*, 3 Har. & J. (Md.) 97; *Groning v. Devana*, 2 Bail. (S. C.) 192.

<sup>10</sup> *Jones v. Jones*, 12 Rich. (S. C.) 116. See also *State v. McDowell*, 2 Brev. (S. C.) 145; *White v. Helmes*, 1 McCord (S. C.) 430.

<sup>11</sup> *People v. Elyca*, 14 Cal. 144.

State law. The first section gives negroes equal rights with whites to give evidence, and they are therefore competent witnesses.<sup>1</sup>

§ 24. **Chinamen.** — It has been held in California that a Chinaman is an "Indian" within the meaning of the statute excluding "Indians" as witnesses.<sup>2</sup> And a more recent case decides that the words "white person," in the California act which provides that "no Indian, or person having one-half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor of or against a white person," refer to the defendant only in a criminal action; and a Chinaman, who is on trial for crime, may introduce Chinese witnesses in his behalf.<sup>3</sup> Another case in the Supreme Court of California denies to a Chinaman the right to testify against a white man who is indicted for robbing him;<sup>4</sup> but as recently as January, 1884, the United States District Court, sitting in that State, laid down what will doubtless be universally accepted as the true rule, viz. that Chinese persons are, under the Constitution and laws of the United States guaranteeing to them "the equal protection of the laws," competent witnesses.<sup>5</sup> The test of their competency, as in the case of Indians, is their capacity to understand the obligation of an oath.<sup>6</sup>

<sup>1</sup> *Ex parte* Warren, 31 Tex. 143;      <sup>2</sup> Cal. Code, § 394; *Speer v. See*  
*Kelly v. State*, 25 Ark. 392; S. P.      *Yup Co.* 13 Cal. 73.  
*Clarke v. State*, 35 Ga. 75; *State v.*      <sup>3</sup> *People v. Awa*, 27 Cal. 638.  
*Underwood*, 63 N. C. 98. *Contra,*      <sup>4</sup> *People v. Jones*, 31 Cal. 565.  
*Bowlin v. Commonwealth*, 2 Bush      <sup>5</sup> *In re Tung Yeong*, 1 West Coast.  
(Ky.) 5. And see *Turner v. Parry*,      Rep. 647; s. c., 19 Fed. Rep. 184.  
27 Ind. 163.      <sup>6</sup> *The Merrimac*, 1 Ben. (U. S.) 490.

## CHAPTER IV.

### COMMON LAW RULE AS TO PARTIES TO THE RECORD.

- § 25. The General Rule excluding them.
- § 26. The Scope and Extent of the Rule.
- § 27. Its Limits and Exceptions.
- § 28. Disinterested, Nominal, and Unnecessary Parties.
- § 29. Parties Liable for Costs.
- § 30. The Rule in Courts of Equity.
- § 31. Competency of One Party as a Witness for Another Party.
- § 32. Competency of Defendant for Co-defendant, generally.
- § 33. ——— in Actions on Contract.
- § 34. ——— in Actions of Tort.
- § 35. ——— in Suits in Equity.
- § 36. Competency of Defendant for Plaintiff.
- § 37. Competency of Plaintiff for Defendant.
- § 38. Effect of Default, *nolle prosequi*, or Verdict: in Actions on Contract.
- § 39. ——— in Actions of Tort.
- § 40. Effect of Misjoinder of Parties Defendant.
- § 41. Witness made Party by Mistake.
- § 42. Common Law Rule as to Defendants in Criminal Cases.
- § 43. Effect of Separate Indictments or Separate Trials.
- § 44. Effect of examining Adverse Party as a Witness.
- § 45. Competency of Judges and Arbitrators.

§ 25. **The General Rule excluding Them.** — The general rule, at common law, is that no party to the record, in a civil suit, can be a witness either on his own behalf or on that of any other party to the suit.<sup>1</sup>

This rule was founded both upon the interest of the witness in the event of the litigation, and upon a general recognition by the law-makers of the expediency of confining the temptations to commit perjury within the narrowest possible limits. Thus it has been repeatedly held that a party upon the record, although divested of all interest in the event of the suit, is an incompetent witness.<sup>2</sup>

<sup>1</sup> 3 Bl. Comm. 371; 1 Gilb. Ev. Lucas v. Payne, 7 Cal. 92; Patterson (Lofft ed.) p. 221; Frear v. Evertson, v. Cobb, 4 Fla. 481; Marks v. Butler, 20 Johns. (N. Y.) 142.

<sup>2</sup> Bridges v. Armour, 5 How. (U. S.) 91; Blanchard v. Sprague, 1 Cliff. (U. S.) 288; The Neptune, Olc. Adm. 483; Johns. (N. Y.) 142; Schermerhorn v. Schermerhorn, 1 Wend. (N. Y.) 119; Benjamin v. Coventry, 19 Id. 353;

But it is believed that the best considered cases, even at common law, based the incompetency of a party to the record, on the ground of interest, and not entirely upon the fact of the witness being a party to the action. Thus it was held in Kentucky, that persons are not incompetent as witnesses merely because they are parties to the action; but if they are parties to the issue, then they are incompetent to testify either in their own favor or in favor of those united with them in the issue; or, if they are not parties to the issue, yet if they are interested in it, whether they are parties to the action or not, they are also incompetent to testify in their own favor.<sup>1</sup>

And Gilbert, Ch. B., said it was a corollary to be deduced from the general rule, that persons interested in the event were, for that reason, incompetent to testify, "that the plaintiff or defendant cannot be a witness in his own cause, for these are the persons who have a most immediate interest."<sup>2</sup> Again, in another case, in the English Common Pleas,<sup>3</sup> Tindal, Ch. J., said: "No case has been cited, nor can any be found, in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit. On the contrary, many have been brought forward, in which parties to the suit, who suffered judgment by default, have been admitted as witnesses against their own interest; and the only inquiry seems to have been, in a majority of cases, whether the party called was interested in the event or not: the admission or rejection of the witness has depended upon this inquiry."<sup>4</sup>

The party being incompetent on account of his interest in the suit, his declarations were also considered inadmissible, in his own behalf, as evidence of the facts therein stated; for

*Canty v. Sumter*, 2 Bay (S. C.) 93; *Knight v. Packard*, 3 McCord (S. C.) 71; *Goodwin v. Harrison*, 6 Ala. 438; *Smith v. Moore*, 4 Ill. 462; *Gillett v. Sweat*, 6 Ill. 475; *Page v. Page*, 15 Pick. (Mass.) 368; *Johnson v. Blackman*, 11 Conn. 342; *Beer v. Ward*, 13 La. Ann. 467; *Beebe v. Kaiser*, 19 La. Ann. 270.

<sup>1</sup> *Chenoweth v. Fielding*, 2 Mete. (Ky.) 517. *S. P. Safford v. Lawrence*, 6 Barb. (N. Y.) 566; *Bryant v. Hunter*, 6 Bush. (Ky.) 75. But compare

*Steptoe v. Read*, 19 Gratt. (Va.) 1. See *infra*, § 28.

<sup>2</sup> *Gilb. Ev.* (3 ed.) 132. *S. P.*, *per Lord Hardwicke*, 3 Atk. 401.

<sup>3</sup> *Worrall v. Jones*, 7 Bing. 395, 398, 399.

<sup>4</sup> That one of two or more defendants who has allowed judgment to go by default, is not thereby rendered competent, see *Ballard v. Noaks*, 2 Ark. 45; *Bank of Louisiana v. Hudson*, 13 La. Ann. 600; *Swanzy v. Parker*, 50 Pa. St. 441.

it was considered that in many cases it would be safer for the purposes of justice to allow the party himself to testify than to admit his statements out of court as evidence in his own favor.<sup>1</sup>

§ 26. **The Scope and Extent of the Rule.** — When the trial is by jury, the common-law rule, both in civil and criminal cases, not only refuses to permit a party to testify at his own instance, but surrounds him with its protecting arm, and refuses to compel him to give evidence for his adversary and against himself. This protection is extended to all the real parties to the controversy, both of record and not of record;<sup>2</sup> and is afforded by the application of the maxim, *Nemo seipsum tenetur prodere*, as to the beneficent working of which rule opinions of able jurists have differed for centuries; one celebrated judge having designated it as “a rule founded in good sense and sound policy,”<sup>3</sup> while other eminent jurists and writers have attacked it with great vigor. It is profitless, however, at the present day, to speculate upon the policy of this maxim, as both in England and this country, it, in common with many others, once equally venerated, has, so far at least as civil cases are concerned, been buried beyond resurrection in a statutory grave.<sup>4</sup>

If, however, the party is willing to testify, or, if, being only a nominal party, the real party in interest consents, he may, in certain cases, be examined.<sup>5</sup> But where a party volunteers his own testimony, either for himself, or on behalf of a co-suitor identified in interest with him, the common-law rule excludes him, upon the principle that “it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it.”<sup>6</sup>

<sup>1</sup> 1 Phill. Ev. (10 ed.) 37; *Sutherland v. M'Laughlin*, Car. & M. 429.

<sup>2</sup> *R. v. Woburn*, 10 East, 395; *Fenn v. Granger*, 3 Campb. 177; *Appleton v. Boyd*, 7 Mass. 131; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Worrall v. Jones*, 7 Bing. 395; *Flint v. Allyn*, 12 Vt. 615.

<sup>3</sup> *Tindal, C. J.*, in *Worrall v. Jones*, 7 Bing. 395.

<sup>4</sup> See *infra*, Chap. VIII.

<sup>5</sup> *Facer v. Evertson*, 20 Johns (N. Y.) 142.

<sup>6</sup> 1 Gilb. Ev. (Lofft ed.) p. 243.

Again, Baron Gilbert says: “For where a man who is interested in the matter in question would also prove it, it rather is a ground for distrust than any just cause of belief; for men are generally so short-sighted as to look to their own private benefit, which is near them, rather than to the good of the world, ‘which, though on the sum of things really best for the individual,’ is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony than

Thus, it has been held, that a party cannot, in any action, be a witness to prove payments which he has made;<sup>1</sup> and that no party can testify in his own case, if it appears that another person can testify to the same facts, even though such person lives out of the State;<sup>2</sup> and that even one who, by purchase, has become merely a *quasi* party to the suit is incompetent.<sup>3</sup> So, also, a plaintiff was not permitted to prove an acknowledgment or new promise of the defendant, in order to remove the bar of the statute of limitations.<sup>4</sup>

§ 27. *Its Limits and Exceptions.*— But this rule of the common law, excluding parties as witnesses, has some further exceptions which have not yet been noted. First among these is the admission of what, in the Roman law, was called the oath *in litem*, which is admitted in two classes of cases: *first*, where the party against whom the other party's oath is offered has already been shown to have been guilty of some fraud or other wrongful and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be adduced upon the question of the amount of damages sustained; and, *secondly*, where public necessity and expediency demands the party's testimony as essential to the due administration of justice.<sup>5</sup>

to believe it. It is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury whose testimony may hurt themselves, and can never induce any rational belief." 1 Gilb. Ev. (Lofft. ed.) p. 223.

The fallacy of this reasoning will be seen more clearly when we come to consider the common-law doctrine of incompetency by reason of interest in the event. *Infra*, §§ 46, etc.

<sup>1</sup> Bradley v. Goodyear, 1 Day (Conn.) 104.

<sup>2</sup> Evans v. Hardgrove, 11 Tex. 210.

<sup>3</sup> Jones v. McNeil, 2 Bail. (S. C.) 466.

<sup>4</sup> Weed v. Bishop, 7 Conn. 128.

<sup>5</sup> Tait, Evid. 280; 1 Greenl. Evid. § 348. Queener v. Morrow, 1 Coldw.

(Tenn.) 123, is a good example of the first class of cases. So where bailiffs, in serving an execution, found money secreted in a wall, which they *embezzled*, and also did damage to other goods of the execution debtor, the latter was allowed to testify as to the damage done to the other goods. *Childrens v. Saxby*, 1 Vern. 207; s. c., 1 Eq. Cas. Abr. 229. So also the owner of jewels with which the defendant had run away, was allowed to swear to their value (*Anonymous*, cited in *East India Co. v. Evans*, 1 Vern. 308); and where a trunk is lost in transit, through guilty and unwarrantable interference with it on the part of the carrier, the owner may swear to its contents (*Garvey v. Camden &c. R. R. Co.*, 1 Hilt. (N. Y.) 280); but, in the last two cases cited, the party's oath was only admitted *in odium spoliatoris*. To the same effect see *Herman v. Drinkwater*, 1 Me. 27; *reaffirmed* in *Gilmore v. Bowden*, 3

An examination of the cases just cited will show that in one at least of them (*Herman v. Drinkwater*) the party's testimony was admitted on the ground of necessity alone, while most of the others required the element of fraud or intermeddling to co-exist with the absence of other means of proof.<sup>1</sup>

*Fairf. (Me.)* 412, where the evidence was admitted on the ground of necessity, although the defendant had clearly been guilty of gross fraud. *Herman v. Drinkwater* was commented on in *Snow v. Eastern R. R. Co.*, 12 Metc. (Mass.) 46, 47, as follows: "In that case a shipmaster received a trunk of goods in London, belonging to the plaintiff, to be carried in his ship to New York, and on board which the plaintiff had engaged his passage. The master sailed, designedly leaving the plaintiff, and proceeded to Portland instead of New York. He there broke open and plundered the trunk. These facts were found *aliunde*, and the plaintiff was allowed to testify as to the contents of the trunk. These cases proceed upon the criminal character of the act, and are limited in their nature. The present case does not fall within the principle. Here was no robbery, no tortious taking-away by the defendants, no fraud committed. It is simply a case of negligence on the part of carriers. The case is not brought within any exception to the common rule, and is a case of defective proof on the part of the plaintiff, not arising from necessity, but from want of caution. To admit the plaintiff's oath in cases of this nature would lead, we think, to much greater mischiefs, in the temptation to frauds and perjuries, than can arise from excluding it. If the party about to travel places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are and of their value, or provide other evidence beforehand of the articles taken by him. If he omits to do this, he then takes the chance of loss as to the value of the articles, and is guilty, in a degree, of

negligence, — the very thing with which he attempts to charge the carrier. Occasional evils only have occurred from such losses through failure of proof, the relation of carriers to the party being such that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented, no facts which have not repeatedly occurred, no new combination of circumstances."

<sup>1</sup> The latter rule is adopted in *Christian v. The United States*, 7 Ct. of Cl. 431. Many cases against bailees are found which seem to proceed upon the ground of necessity alone (*Dougllass v. Montgomery & Co. R. C. Co.*, 37 Ala. 638; s. c., 1 Ala. Sel. Cas. 566; *Kitchen v. Robbins*, 29 Ga. 713; *Pettigrew v. Barnum*, 11 Md. 434; *Parmelee v. McNulty*, 19 Ill. 556; *Indiana & Co. R. R. Co. v. Gulick*, 19 Ind. 83; *Nolan v. Ohio & Co. R. R. Co.*, 39 Mo. 114; *Williams v. Frost*, Id. 516; *Taylor v. Monnot*, 4 Duer (N. Y.) 116), and many others deny to the plaintiff the right to testify as to the contents or value in such cases (*McNabb v. Lockhart*, 18 Ga. 495; *Illinois & Co. R. Co. v. Taylor*, 24 Ill. 323; *Same v. Copeland*, Id. 332; *Packard v. Northcraft*, 2 Metc. (Ky.) 439; *Pope v. Hall*, 14 La. Ann. 324; *Block v. The Trent*, 18 Id. 664; *Wright v. Caldwell*, 3 Mich. 51; *Snow v. Eastern R. R. Co.*, 12 Metc. (Mass.) 44; *Smith v. N. Carolina R. R. Co.*, 1 Winst. (N. C.) 203; *David v. Moore*, 2 Watts & S. (Pa.) 230. In *Clark v. Spence*, 10 Watts (Pa.) 336, 337, *Rogers, J.*, illustrates these principles as follows: "A party is not competent to testify in his own cause; but, like every other general rule, this has its exceptions. Necessity, either physical or

The question was quite recently presented for solution to the Supreme Court of the United States,<sup>1</sup> in the case of an appeal from the Court of Claims. In rendering the opinion of the Supreme Court, Miller, J., said: "We are of opinion that, by the rules of evidence derived from the common law, as it is understood in the United States, whenever it becomes important to ascertain the contents of a box, trunk, or package which has been lost or destroyed under circumstances that make some one liable in a court of justice for the loss, and the loss and liability are established by other testimony, the owner or party interested in the loss, though

moral, dispenses with the ordinary rules of evidence. In 12 Vin. 24, pl. 32, it is laid down that on a trial at Bodnyr, *coram* Montague, B., against a common carrier, a question arose about the things in a box; and he declared that this was one of those cases where the party himself might be a witness *ex necessitate rei*. For every one did not show what he put in his box. The same principle is recognized in decisions which have been had on the statute of Hue and Cry, in England, where the party robbed is admitted as a witness *ex necessitate* (Bull. N. P. 181). So, in *Herman v. Drinkwater*, 1 Greenl. 27, a shipmaster, having received a trunk of goods on board his vessel, to be carried to another port, which, on the passage he broke open and rifled of its contents, the owner of the goods, proving the delivery of the trunk, and its violation, was admitted as a witness, in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. That a party, then, can be admitted under certain circumstances to prove the contents of a box or trunk, must be admitted. But, while we acknowledge the exception, we must be careful not to extend it beyond its legitimate limits. It is admitted from necessity, and perhaps on a principle of convenience; because, as is said in *Viner*, every one does not show what he puts in a box. This applies with great force to wearing

apparel, and to every article which is necessary or convenient to the traveller,—which in most cases are packed by the party himself or his wife, and which therefore would admit of no other proof. A lady's jewelry would come in this class; and it is easier to conceive than to enumerate other articles which come within the same category. Nor would it be right to restrict the list of articles which may be so proved, within narrow limits, as the jury will be the judges of the credit to be attached to the witness, and be able in most cases to prevent any injury to the defendant. It would seem to me to be of no consequence whether the article was sent by a carrier, or accompanied the traveller. The case of *Herman v. Drinkwater*, I would remark, was decided under very aggravated circumstances, and was rightly ruled. But it must be understood that such proof cannot be admitted merely because no other evidence of the fact can be obtained; for if a merchant, sending goods to his correspondent, chooses to pack them himself, his neglect to furnish himself with the ordinary proof is no reason for dispensing with the rule of evidence, which requires disinterested testimony. It is not of the usual course of business; and there must be something peculiar and extraordinary in the circumstances of the case which would justify the court in admitting the oath of the party."

<sup>1</sup> October term, 1877.



he may be a party to the suit, is a competent witness to prove the contents so lost or destroyed.<sup>1</sup> This is one of those exceptions to the rigorous rule of the common law excluding parties and persons having an interest in the result of the suit from becoming witnesses in their own behalf, which has been engrafted upon that system. It is founded in the necessity of permitting the only party who knows the matter to be proved, to testify in order to prevent an absolute failure of justice, where his right to relief has been established by other evidence. We are aware that there is a conflict of authority on this point, but we believe the preponderance is in favor of the proposition we have stated; and, looking at it as a matter of principle, in the light of the progress of legislation and judicial decision, in the direction of more liberal rules of evidence, we have no hesitation in adopting it in the absence of legislation by Congress on the subject.”<sup>2</sup>

In the opinion of the present writer this is the best explanation of this exception to the common-law rule, to be found in the books.

There are many other decisions which permit the testimony of a party where the facts he is offered to prove are such in their nature that no one but he would be likely to have knowledge of them. Thus, where a deed or other written instrument is shown to have once existed, its loss may be proved by a party, in order to let in secondary evidence of its contents.<sup>3</sup>

And where the execution of an instrument is to be established, a party may prove the death of a subscribing witness, to the end that secondary evidence of his handwriting may be let in.<sup>4</sup> So, also, he may prove notice to the adverse party to produce the paper.<sup>5</sup>

<sup>1</sup> Citing 1 Greenl. Evid. §§ 348-350, and notes.

<sup>2</sup> United States v. Clarke, 6 Otto (U. S.) 41.

<sup>3</sup> Chamberlain v. Gorham, 20 Johns. (N.Y.) 144; Jackson v. Frier, 16 Id. 193; Tayloe v. Riggs, 1 Pet. (U.S.) 591, 596; Patterson v. Winn, 5 Id. 240, 242; Riggs v. Tayloe, 9 Wheat. (U.S.) 486; De Lane v. Moore, 14 How. (U.S.) 253; Boyle v. Arledge, Hempst. (U.S.) 620; Nichols v. White, 1 Cr. C. C. 58; Taunton Bank v. Richardson, 5 Pick. (Mass.) 436, 442; Poignard v. Smith,

8 Id. 278; Page v. Page, 15 Id. 374, 375; Meeker v. Jackson, 3 Yeates (Pa.) 442; Smiley v. Dewey, 17 Ohio, 156; Blanton v. Miller, 1 Hayw. (N. C.) 4. The case of Coleman v. Wolcott, 4 Day (Conn.) 388, to the contrary, is overruled in Fitch v. Bogue, 19 Conn. 285. But see Cotton v. Beasley, 2 Murph. (N. C.) 259.

<sup>4</sup> Douglass v. Sanderson, 2 Dall. 116. s. c., 1 Yeates (Pa.) 15; Jackson v. Davis, 5 Cow. (N.Y.) 123. S. P. Moore v. Maxwell, 18 Ark. 469.

<sup>5</sup> Siltzell v. Michael, 3 Watts & S.

Following out this principle, in a bastardy case, the mother, whether she be the complainant or not, may swear to facts within her own exclusive knowledge;<sup>1</sup> and in an action against a town for an injury arising from a defect in a highway,<sup>2</sup> or against a county for the value of property destroyed by a mob,<sup>3</sup> the plaintiff is a competent witness. So, also, the party robbed is a competent witness in an action against the hundred, under the statute of Winton;<sup>4</sup> and in an action of slander the plaintiff is competent, and if the words charged are proved by her testimony to have been spoken in presence of others, the jury, if they believe her, may find a verdict upon her testimony alone.<sup>5</sup> Parties are also competent to prove or disprove usury.<sup>6</sup>

The second class of cases in which the oath *in litem* is admitted at common law, is where public necessity and expediency demand the party's testimony as essential to the due administration of justice. Thus, a party to the record can give evidence in his own favor, when no other can reasonably be expected, or when otherwise there would be a failure of justice.<sup>7</sup> So, also, in cases of necessity, where a statute can receive no execution, unless the party interested be a witness, there he must be allowed to testify, for the statute must not be rendered ineffectual by the impossibility of proof.<sup>8</sup>

§ 28. **Disinterested, Nominal, and Unnecessary Parties.** — The rule of exclusion being founded, as we have seen, upon the interest of the witness rather than his being named upon the record as a party, if he has no interest in the event, he may testify.<sup>9</sup>

Thus, a mere nominal plaintiff, whose name is on the record as a naked trustee, and who is not liable for costs,

(Pa.) 329; *Jordan v. Cooper*, 3 S. & R. (Pa.) 564.

<sup>1</sup> *Davis v. Salisbury*, 1 Day (Conn.) 278; *Judson v. Blanchard*, 4 Conn. 557; *Mariner v. Dyer*, 2 Me. 172; *Drowne v. Stimpson*, 2 Mass. 441; *Anonymous*, 3 N. H. 135; *State v. Coatney*, 8 Yerg. (Tenn.) 210; *Mather v. Clark*, 2 Aik. (Vt.) 209.

<sup>2</sup> *Stover v. Bluehill*, 51 Me. 439.

<sup>3</sup> *County v. Leiddy*, 10 Pa. St. 45.

<sup>4</sup> *Bull. N. P.* 187, 289.

<sup>5</sup> *Hess v. Fockler*, 25 Iowa, 9.

<sup>6</sup> *Fredlander v. Strawn*, 25 Ill. 219.

<sup>7</sup> *Lampley v. Scott*, 24 Miss. 528.

<sup>8</sup> *United States v. Murphy*, 16 Pet. (U. S.) 203.

<sup>9</sup> *Robert v. Boynton*, 30 Ga. 939; *Reimsdyk v. Kane*, 1 Gall. (U. S.) 630; *Wooten v. Nall*, 18 Ga. 609; *Neal v. Lamar*, Id. 746; *Foster v. Leeper*, 29 Ga. 294; *Shellenbarger v. Norris*, 2 Ind. 285; *Draper v. Vanhorn*, 12 Ind. 353; *Barker v. Ayers*, 5 Md. 202; *Block v. Chase*, 15 Mo. 344; *Jackson v. Barron*, 37 N. H. 494; *Safford v. Lawrence*, 6 Barb. (N. Y.) 566; *Wilson v. Allen*, 1 Jones (N. C.) Eq. 24.

is competent; but in such case the real party in interest is disqualified though not named on the record.<sup>1</sup> So also a person named in the process or petition, but not served with process or cited to appear, is not a party to the litigation so as to disqualify him as a witness.<sup>2</sup>

§ 29. **Parties Liable to Costs.** — The interest in the event which will disqualify a party to the record need not be a direct interest in the subject-matter of the suit: a mere liability for costs will exclude him.<sup>3</sup> Thus, a liability for costs will disqualify a master in chancery from being a witness on his own behalf in a suit brought by him in his official capacity.<sup>4</sup> The same is the case of trustees, guardians, personal representatives, and corporate officers.<sup>5</sup> In such a case the legal plaintiff on the record is not a competent witness, even though the party for whose use the suit is brought offers to deposit in court any sum which the court may direct, to cover the liability of such plaintiff for costs;<sup>6</sup> and conversely, the person for whose use a suit is brought, being liable, by statute, for costs, if the suit fails, is not a competent witness for the plaintiff; nor can he be rendered competent, in such case, by his release of his interest in the cause of action to the plaintiff.<sup>7</sup>

§ 30. **The Rule in Courts of Equity.** — The general rule is that a party cannot be admitted to testify in his own favor in chancery, any more than at law,<sup>8</sup> unless an order of the court for his examination be first obtained;<sup>9</sup> if examined without an order for such purpose, his testimony will be

<sup>1</sup> *Ryerss v. Trustees &c.*, 33 Pa. St. 114; *Prewett v. Marsh*, 1 Stew. & P. (Ala.) 17; *Duffee v. Pennington*, 1 Ala. 506; *Coopwood v. Foster*, 20 Miss. 718; *Sawyer v. Mitchell*, 27 Mo. 510.

<sup>2</sup> *Taylor v. Hancock*, 14 La. Ann. 693; *Robinson v. Frost*, 14 Barb. (N.Y.) 536; *Conwell v. Smith*, 4 Ind. 359.

<sup>3</sup> *Kennedy v. Evans*, 31 Ill. 258; *Walker v. McKnight*, 15 B. Mon. (Ky.) 467; *Selby v. Clayton*, 7 Gill (Md.) 240; *Foley v. Mason*, 6 Md. 37; *Owings v. Emery*, 7 Id. 405.

<sup>4</sup> *Gray v. Ottolenqui*, 12 Rich. (S.C.) 101.

<sup>5</sup> 1 Greenl. Ev. (14 ed.) § 347, n. (3);

*Chalmers v. Chalmers*, 4 Gill & J. (Md.) 420.

<sup>6</sup> *Owings v. Emery*, 7 Gill (Md.) 405.

<sup>7</sup> *Ellison v. Johnson*, 7 Blackf. (Ind.) 217. As to the disqualification of a witness not a party, by reason of liability for costs, see *infra*, § 51.

<sup>8</sup> *Webb v. Fitch*, 1 Root (Conn.) 177; *Livingston v. Bird*, Id. 255; *Lingam v. Henderson*, 1 Bland (Md.) 236; *Foot v. Silsby*, 3 Blatchf. (U. S.) 507. *Contra*, *Atlanta &c. R. R. Co. v. Hodnett*, 36 Ga. 669.

<sup>9</sup> *Clagett v. Hall*, 9 Gill & J. (Md.) 80; *Wheeler v. Emmerson*, 2 Blackf. (Ind.) 293; *Second &c. Soc. v. First &c. Soc.*, 14 N. H. 315; *Pusey v. Wright*, 31 Pa. St. 387.

suppressed, if objected to promptly.<sup>1</sup> But a mere nominal or unnecessary party, devoid of interest,<sup>2</sup> or against whom the bill has been taken as confessed, and who has no interest,<sup>3</sup> could testify even before the passage of the enabling statutes.

An exception to this rule, peculiar to courts of equity, is that the *answer* of the defendant, so far as it is strictly responsive to the bill, is evidence for as well as against the defendant. The reason upon which this exception stands, is this. The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence, and the answer becomes equal to the testimony of any other single witness.<sup>4</sup>

§ 31. **Competency of One Party as a Witness for Another Party.** — In some jurisdictions it was held, before the passage of the enabling statutes, that one of the parties to an action might, if he was willing, testify for his adversary, even against the consent of the other parties united in interest with him; but that he could not be compelled so to do. The reasoning upon which this doctrine was based was, that the privilege not to testify against himself was personal to the party, and not shared by his associates, and that his testimony being against his own interest, his oath in court should be taken, at least as freely as his declarations out of court, which, if against his interest, were admissible.<sup>5</sup> But the more prevalent, and it would seem more consistent, opinion was that all the parties must consent before one of them could be used as a witness;<sup>6</sup> and even then he was not always admitted, as we shall see further on.

This rule of exclusion had more particular application to the admissibility of the testimony of one of several co-plaintiffs, which was rigidly excluded.<sup>7</sup> But it has been held that

<sup>1</sup> *Bogert v. Bogert*, 2 Edw. (N. Y.) 399.

<sup>2</sup> *Day v. Cummings*, 19 Vt. 496.

<sup>3</sup> *Pingree v. Coffin*, 12 Gray (Mass.) 288.

<sup>4</sup> *Clarke v. Van Riemsdyk*, 9 Cranch (U. S.) 153, 160. But it seems the answer of an infant or *feme covert* cannot be read against the defendant. 1 Greenl. Ev. § 351, n. (2) [14 Ed.].

<sup>5</sup> *Norden v. Williamson*, 1 Taunt.

377; *Fenn v. Granger*, 3 Campb. 177; *Worrall v. Jones*, 7 Bing. 395. See a criticism of these cases in 1 Greenl. Ev. (14 ed.) § 354, n. (4), and the additional cases there cited.

<sup>6</sup> *Frazier v. Laughlin*, 6 Ill. 347; *Kennedy v. Niles*, 14 Me. 54; *Scott v. Lloyd*, 12 Pet. (U. S.) 149; *Bridges v. Armour*, 5 How. (U. S.) 91.

<sup>7</sup> *Servis v. Beatty*, 32 Miss. 52; *Eckford v. De Kay*, 6 Paige (N. Y.) 565.

where the point to be proved is special damages to the separate property of a co-plaintiff, there is no interest which will exclude the witness.<sup>1</sup>

§ 32. **Competency of Defendant for Co-defendant, generally.** — The result of the common-law rule excluding parties as witnesses was, that in general, one co-defendant could not be a witness for another;<sup>2</sup> especially where his testimony would tend to benefit himself;<sup>3</sup> or where both he and the defendant in whose favor he would testify, rely upon the same matters of defence, although by separate answers.<sup>4</sup> And this is so even though he has confessed judgment, or succeeded in his defence.<sup>5</sup> Thus a defendant in ejectment is incompetent for a co-defendant,<sup>6</sup> even after judgment in his favor.<sup>7</sup>

In Alabama, however, he was admitted for his co-defendant after the plaintiff had closed his evidence, the jury being instructed not to consider his testimony either for or against himself;<sup>8</sup> and in Indiana, where one of two defendants appealed from a judgment of a justice of the peace rendered against them jointly, the one not appealing was allowed to testify for the other on the trial *de novo* in the appellate court.<sup>9</sup> In Missouri it was held that a defendant on the record is not disqualified as a witness for his co-defendant by that fact alone: he is competent to testify as to some matters. When the witness is sworn, objections may be taken to so much of his testimony as may be inadmissible.<sup>10</sup> And in Wisconsin, a defence not affecting the liability of the pleader's co-defendant may be proved by that co-defendant's testimony, without notice to the plaintiff that such testimony is to be relied on.<sup>11</sup>

§ 33. — **in Actions on Contract.** — Applying these principles, it has been held that where a defendant has no

<sup>1</sup> *Draper v. Vanhorn*, 12 Ind. 353. See also *Little v. Hazzard*, 5 Harr. (Del.) 291; *Harris v. Harris*, 25 Mo. 567.

<sup>2</sup> *Rankin v. Harper*, 23 Mo. 579; *Rice v. Morton*, 19 Mo. 203; *Calhoun v. Wright*, 23 Tex. 522.

<sup>3</sup> *Hotaling v. Cronise*, 2 Cal. 60; *Easterly v. Bassignano*, 20 Cal. 489; *Anderson v. Weaver*, 17 Ind. 223; *Vaughn v. Scade*, 30 Mo. 600; *Gould v. Beal*, 26 Tex. 665.

<sup>4</sup> *Chenoweth v. Fielding*, 2 Metc. (Ky.) 517.

<sup>5</sup> *Noble v. Laley*, 50 Pa. St. 281.

<sup>6</sup> *Cambria Iron Co. v. Toombs*, 48 Pa. St. 388; *Merrill v. Gould*, 16 N. H. 347.

<sup>7</sup> *Helfenstein v. Leonard*, 50 Pa. St. 461.

<sup>8</sup> *Hurtur v. Buford*, 38 Ala. 243.

<sup>9</sup> *Goodhue v. Palmer*, 13 Ind. 457.

<sup>10</sup> *Alexander v. Shortridge*, 33 Mo. 349.

<sup>11</sup> *Anderson v. Prindle*, 11 Wis. 136.

separate defence in an action on a joint contract, a co-defendant called as a witness could prove nothing that would not inure to his own benefit as well as to the benefit of his co-defendant; as to such matters he is, therefore, interested, and of course incompetent.<sup>1</sup> His testimony must relate to some matter in which he himself has no interest,<sup>2</sup> in which event he is competent.<sup>3</sup> Thus a defendant is a competent witness for his two co-defendants, to prove that they are not his partners, and are not liable with him for the debt sued on.<sup>4</sup> The competency of the witness in these cases is to be determined by the relations to each other in which the co-defendants have placed themselves by their contract, and not by those relations, as parties to the action, which have been involuntarily imposed on them by the act of the plaintiff.<sup>5</sup> Thus, where one defendant files a cross-complaint alleging interests adverse to those of his co-defendants in the original action, he may testify in regard to such matters.<sup>6</sup>

§ 34. ——— in **Actions of Tort.** — Except in the case of a defaulted defendant,<sup>7</sup> there seems to be but little difference, if any, between the competency of a defendant as a witness for a co-defendant in actions of tort and actions of contract. Where the action is in tort against two defendants, neither is a competent witness for the other, where the evidence of each one must avail himself as much as the other.<sup>8</sup> So held of co-defendants charged with a joint conversion of property;<sup>9</sup> otherwise in the case of a joint wrongful detention of personal property,<sup>10</sup> and in the case of a joint trespass.<sup>11</sup> Again, in an action for a joint libel, it has been held that neither defendant could testify for the other.<sup>12</sup> And even though the proposed witness has not been served with process, he is still incompetent.<sup>13</sup>

<sup>1</sup> *King v. Lowry*, 20 Barb. (N. Y.) 532.

<sup>2</sup> *Frost v. Hanford*, 1 E. D. Smith (N. Y.) 540.

<sup>3</sup> *Ford v. David*, 1 Bosw. (N. Y.) 569.

<sup>4</sup> *Culbertson v. Holden*, 8 Bush (Ky.) 161.

<sup>5</sup> *Ladue v. Van Vechten*, 8 Barb. (N. Y.) 664.

<sup>6</sup> *Nye v. Lowry*, 82 Ind. 316.

<sup>7</sup> See *infra*, §§ 38, 39.

<sup>8</sup> *Johnson v. Henderson*, 3 Cal. 368. But see to the contrary, *Beal v. Finch*,

11 N. Y. 128; *Eno v. Del Vecchio*, 4 Duer (N. Y.) 53; *Brown v. Marsh*, 8 Vt. 312; *Paine v. Tilden*, 20 Vt. 554.

<sup>9</sup> *Munson v. Hegeman*, 10 Barb. (N. Y.) 112.

<sup>10</sup> *Gardner v. Finley*, 19 Barb. (N. Y.) 317.

<sup>11</sup> *Johnson v. Brown*, 1 Wash. (Va.) 187; *Marsh v. Berry*, 7 Cow. (N. Y.) 344.

<sup>12</sup> *Forshee v. Abrams*, 2 Iowa, 571.

<sup>13</sup> *Gates v. Nash*, 6 Cal. 192; *Dodge v. Averill*, 5 How. (N. Y.) Pr. 8.

§ 35. ——— in **Suits in Equity**.—In chancery practice the rule of exclusion as respects co-defendants is not so strict as at law. Thus a defendant who has no interest,<sup>1</sup> or who is only a formal party, or testifies against his own interest,<sup>2</sup> or who might still be liable for debts and costs, though the defendant, for whom he was offered as a witness, maintained his defence,<sup>3</sup> is a competent witness for his co-defendants. Even a defendant who is charged with fraud, but against whom nothing specific is prayed, may be a witness for his co-defendant.<sup>4</sup>

In such cases, however, an order of the court must be obtained for the examination of the witness.<sup>5</sup> The order is generally grantable as of course on a showing of the materiality and lack of interest of the witness in respect of the matters as to which he will testify, the order being made subject to all just exceptions.<sup>6</sup>

If the proposed witness be interested, he cannot testify even in favor of a co-defendant who has no interest in defeating the plaintiff's claim.<sup>7</sup> And where one defendant answers, and the other interposes a plea which is put in issue, and the defendant answering is examined as a witness for his co-defendant, his testimony must be restricted to matters in proof of the plea in which he is not himself interested.<sup>8</sup>

§ 36. **Competency of Defendant for Plaintiff**.—Under the common-law rule we are now discussing, a defendant has been considered an incompetent witness for the plaintiff even in chancery cases;<sup>9</sup> but where he is made a defendant for mere form's sake and no decree is prayed against him, the

<sup>1</sup> *Kirk v. Hodgson*, 2 Johns. (N. Y.) Ch. 550; *Bradshaw v. Combs*, 102 Ill. 428; *Williams v. Maitland*, 1 Ired. (N. C.) Eq. 92; *Wilder v. Mann*, 5 Jones (N. C.) Eq. 66; *Wright v. Wright*, 2 McCord (S. C.) Ch. 185; *Etheredge v. Partain*, 10 Rich. (S. C.) Eq. 207.

<sup>2</sup> *Burns v. Taylor*, 23 Ala. 255; *Kirk v. Hodgson*, *supra*.

<sup>3</sup> *Craddock v. Thornton*, 11 B. Mon. (Ky.) 100.

<sup>4</sup> *M'Donald v. Neilson*, 2 Cow. (N. Y.) 139. See *Whipple v. Lansing*, 3 Johns. (N. Y.) Ch. 612. As to whether his liability for costs will exclude him in such

a case, see *Pope v. Andrews*, 1 Sm. & M. (Miss.) Ch. 135; *Ormsby v. Bakewell*, 7 Ohio, Pt. I. 98; *Kennedy v. Evans*, 31 Ill. 258; *Dearmond v. Dearmond*, 12 Ind. 455.

<sup>5</sup> *Bell v. Jasper*, 2 Ired. (N. C.) Eq. 597.

<sup>6</sup> 2 Dan. Ch. Pr. (Perk. Ed.) 1035, n.; *Id.* 1043; *Ashton v. Parker*, 14 Sim. 632.

<sup>7</sup> *Clarke v. Wyburn*, 12 Jur. 613.

<sup>8</sup> *Emerson v. Atwater*, 7 Mich. 12.

<sup>9</sup> *Clarke v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Collins v. Creditors*, 18 La. Ann. 235; *Thomas v. Graham*, Walk. (Mich.) 117.

complainant may examine him;<sup>1</sup> and in Kentucky, he could be called by the complainant, even though a necessary party, provided he would not be affected by the decree against his co-defendant, and did not swear in favor of his own interest.<sup>2</sup>

Again, a co-defendant upon whom process was not served, may be a competent witness for the plaintiff to prove particular facts material to the issue; but not to establish the fact of a partnership between himself and his co-defendants.<sup>3</sup>

In Pennsylvania, it is held that the defendant in an execution, under which goods previously sold to others are levied upon as his property, is a competent witness for the claimants, in an interpleader issue, to determine the right to the property levied upon;<sup>4</sup> and even in *indebitatus* assumpsit he is competent, if willing to testify;<sup>5</sup> so also, a joint trespasser may testify for the plaintiff.<sup>6</sup> And in South Carolina, it was held that one of two defendants, consenting to be sworn, though objected to by the other defendant, is a competent witness for the plaintiff.<sup>7</sup> So, also, when a witness ultimately liable to the defendant is examined by him, previous to his answering the bill, and the witness is afterwards made a party defendant, his deposition may be read by the complainant, if the facts to entitle the complainant to the relief sought are admitted by the answer of the new party. Under such circumstances, he is a competent witness for the complainant, and his deposition will not be rejected because taken without the order of the court.<sup>8</sup>

§ 37. **Competency of Plaintiff for Defendant.**—The rule of the common law as most frequently applied was, that although a defendant may be examined as a witness by the complainant, and where he is not interested in the matter as to which it is proposed to examine him, he may also be examined as a witness by a co-defendant, yet a co-complainant cannot be examined as a witness for the other complainant, nor can he be examined as a witness by the defendant,<sup>9</sup> even though

<sup>1</sup> Ragan v. Echols, 5 Ga. 71; Clendaniel v. Hastings, 5 Harr. (Del.) 408.

<sup>2</sup> Williams v. Beard, 3 Dana (Ky.) 158.

<sup>3</sup> Heckert v. Fegely, 6 Watts & S. (Pa.) 139.

<sup>4</sup> Allentown Bank v. Beck, 49 Pa. St. 394.

<sup>5</sup> London & Co. Soc. v. Hagarstown & Co. Bank, 36 Pa. St. 408.

<sup>6</sup> Kennedy v. Philip, 13 Pa. St. 408.

<sup>7</sup> Corrie v. Calder, 6 Rich. (S. C.) 198.

<sup>8</sup> Waller v. Gibbs, 10 Ala. 131.

<sup>9</sup> Servis v. Beatty, 32 Miss. 52.



willing to testify.<sup>1</sup> But a mere nominal plaintiff was deemed a competent witness for the defendant, if willing; if unwilling, he could not be compelled to testify.<sup>2</sup>

§ 38. **Effect of Default, Nolle Prosequi or Verdict, in Actions on Contract.**—So far as we have examined into the competency of co-defendants as witnesses, one for the other, we have regarded them as still in the same relative situation as at the beginning of the suit; but quite often one of several co-defendants, during the progress of the litigation, is placed in a position quite different from that occupied by the others, in consequence of a judgment by default, a *nolle prosequi* or a separate verdict on the trial: in such cases a different rule prevails. And that rule (speaking, now, generally of all classes of civil actions) is, that where, as respects the particular defendant offered as a witness for one or more of his associates, the suit is at an end; his interest therein, so far as the others are concerned, blotted out; his own position and liability finally and definitely determined — he is a competent witness for either or all of the other defendants.<sup>3</sup> But the common-law courts were for some time indisposed to adopt this rule in actions on contracts, on the theory that the defaulted defendant (the contract sued upon being laid jointly, could be held liable only in case of a verdict against his co-defendants; and consequently he was an interested party, and as such inadmissible as a witness.<sup>4</sup> Thus, it was held that in *assumpsit*, one co-defendant, though defaulted, could not testify for another;<sup>5</sup> nor against his co-defendant.<sup>6</sup> Accordingly it has been held that where one defendant sets up several matters of defence, some of which are personal to himself, and others going to show that the plaintiff has no cause of action against any of the defendants, one who is

<sup>1</sup> Kennedy v. Niles, 14 Me. 54.

<sup>2</sup> Prewitt v. Marsh, 1 Stew. & P. (Ala.) 17; Duffee v. Pennington, 1 Ala. 506; Coopwood v. Foster, 20 Miss. 718. *Contra*, Nalle v. Gates, 20 Tex. 315; but in that case his declarations were held admissible.

<sup>3</sup> Talmage v. Burlingame, 9 Pa. St. 21; Manchester Bank v. Moore, 19 N. H. 564.

<sup>4</sup> Mant v. Mainwaring, 8 Taunt. 139; Brown v. Brown, 4 Id. 752; Schermerhorn v. Schermerhorn, 1 Wend. (N. Y.)

119; Mills v. Lee, 4 Hill (N. Y.) 549; Thornton v. Blaisdell, 37 Me. 190; Vinal v. Burrill, 18 Pick. (Mass.) 29; King v. Lowry, 20 Barb. (N. Y.) 532; Bull v. Strong, 8 Metc. (Mass.) 8; Walton v. Tomlin, 1 Ired. (N. C.) L. 593.

<sup>5</sup> Kimball v. Lamson, 2 Vt. 138; Pillsbury v. Nelson, 2 N. H. 283.

<sup>6</sup> Columbian Manuf. Co. v. Dutch, 13 Pick. (Mass.) 125. See also Bohun v. Taylor, 6 Cow. (N. Y.) 313; Green v. Sutton, 2 M. & Rob. 269. But see *infra*, § 37.

defaulted cannot be a witness to sustain any of the matters of defence.<sup>1</sup> Nor was one defendant, though defaulted, permitted to testify that he was authorized by his co-defendant to sign a note, as he would thereby reduce the amount of a judgment against himself.<sup>2</sup>

On the other hand, it was held in Alabama, in an action against several partners, one of whom was defaulted, that the latter could testify as to the existence of a partnership between himself and his co-defendants.<sup>3</sup> And other early cases are found which admit the evidence of the defaulted defendant as to matters in which he can have no interest.<sup>4</sup>

Upon the same principle, one of several joint defendants, when discharged by the judgment of the court, becomes a competent witness for the other defendants;<sup>5</sup> and if there is an entire want of evidence against one of several defendants, whether sued in tort or contract, the court may direct the jury to find a verdict for him, and he may then be used as a witness.<sup>6</sup> But the discharge in bankruptcy of one of several defendants, after suit brought, will not, at common law, render him competent to testify in the suit.<sup>7</sup>

§ 39. — in **Actions of Tort.** — In actions *on torts*, the facts being that there is no contribution between wrongdoers, and that such actions are in their nature several as well as joint, the rule of the common law was not applied as rigidly as in actions on contracts. The rule pretty uniformly applied in these actions was to admit a defendant who had suffered a default as a witness for his fellow-defendants, his fate being fixed and determined by the judgment against him.<sup>8</sup> So, if in an action of trespass against several, one is acquitted, he may be a witness for the others in a petition for a new trial,

<sup>1</sup> *Bowman v. Noyes*, 12 N. H. 302; *George v. Sargent*, Id. 313.

<sup>2</sup> *Washburn v. Alden*, 5 Cal. 463.

<sup>3</sup> *Scott v. Jones*, 5 Ala. 694.

<sup>4</sup> *Upton v. Adams*, 27 Ind. 432; *Blake v. Ladd*, 10 N. H. 190; *Essex Bank v. Rix*, Id. 201.

<sup>5</sup> *Barnes v. Barber*, 6 Ill. 401.

<sup>6</sup> *Campbell v. Hood*, 6 Mo. 211; *Prettyman v. Dean*, 2 Harr. (Del.) 494; *Brown v. Burrus*, 8 Mo. 26; *Over v. Blackstone*, 8 Watts & S. (Pa.) 71. The rule is otherwise, it seems, in *assumpsit*. *Berry v. Stevens*, 71 Me. 503.

<sup>7</sup> *Given v. Albert*, 5 Watts & S. (Pa.) 333; *Irwin v. Shumaker*, 4 Pa. St. 199; *Raven v. Dunning*, 3 Esp. 25; *Emmet v. Butler*, 7 Taunt. 599; s. c., 1 Moo. 332. *Contra*, *Bate v. Russell*, 1 Moo. & M. 332. And see *Bradlee v. Neal*, 16 Pick. (Mass.) 501; *Vinal v. Burrill*, 18 Id. 29.

<sup>8</sup> *Ward v. Hayden*, 2 Esp. 552; *Hawkesworth v. Showler*, 12 Mees. & W. 48; *Chapman v. Graves*, 2 Campb. 334; *Commonwealth v. Marsh*, 10 Pick. (Mass.) 57.

notwithstanding the plaintiff has brought a petition against him.<sup>1</sup> But if in default, and no assessment of damages has been had against him, he has been held incompetent.<sup>2</sup> And he has been considered incompetent even though called to testify as to matters not connected with the question of damages.<sup>3</sup> So, also, in a complaint for flowage, under an early statute in Maine, one of two respondents, after being defaulted, was held incompetent as a witness for the other.<sup>4</sup>

§ 40. **Effect of Misjoinder of Parties Defendant.**—Where one who is a material witness for the defendants is joined with them by the plaintiff for the purpose of depriving them of the benefit of his testimony, this is a fraud upon them, and the court, in the exercise of its discretion in the premises,<sup>5</sup> will generally direct the jury to acquit the defendant so joined, and then, the cause being ended as to him, he becomes a competent witness for the other defendants. But it is only where the plaintiff offers no evidence whatever against such defendant that his competency can be thus restored; for, if any evidence is offered against him, though in the opinion of the presiding judge not enough to charge him, it cannot be claimed that he was made a defendant through the artifice and fraud of the plaintiff,<sup>6</sup> and he cannot be permitted to testify until the jury have passed upon his guilt or innocence.<sup>7</sup> The better opinion is that in actions of tort, when the plaintiff rests his case, if there is no evidence whatever against one of the defendants, and there seems to be no probability that the continuance of the trial will disclose any, the defendant so situated should be instantly acquitted.<sup>8</sup>

It has been held that a person named in the writ as a defendant, if not served with process, is not a party to the

<sup>1</sup> *Wolf v. Church*, 2 Root (Conn.) 420.

<sup>2</sup> *Chase v. Lovering*, 27 N. H. 295.

<sup>3</sup> *Gerrish v. Cummings*, 4 Cush. (Mass.) 391.

<sup>4</sup> *Wood v. Kelley*, 30 Me. 47.

<sup>5</sup> *Brotherton v. Livingston*, 3 Watts & S. (Pa.) 334.

<sup>6</sup> *Wakeley v. Hart*, 6 Binn. (Pa.) 316; *Barney v. Cutler*, 1 Root (Conn.) 489; *State v. Shaw*, Id. 134; *Prairie Rose v. Cross*, 34 Mo. 199; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Van Deusen v. Van Slyck*, 15 Id. 223. *S. P. Keteltas v. Penfold*, 4

*E. D. Smith* (N. Y.) 122. *Contra*, *State v. Carter, Coxe* (N. J.) 1. See also *Eckford v. De Kay*, 6 Paige (N. Y.) 565.

<sup>7</sup> *Brown v. Howard*, 14 Johns. (N. Y.) 119, 122; *Van Deusen v. Van Slyck*, *supra*.

<sup>8</sup> *Child v. Chamberlain*, 6 Car. & P. 213; *Cochran v. Ammon*, 16 Ill. 316; *Beasley v. Bradley*, 2 Swan (Tenn.) 180. As to the application of this rule in actions upon contracts, see *Bate v. Russell*, 1 Moo. & M. 332; *Emmet v. Butler*, 7 Taunt. 599.

action, and may be examined as a witness for the defendant served;<sup>1</sup> especially if he be released from contribution.<sup>2</sup> But, on the other hand, it has been held that where a joint judgment against two defendants is rendered on the confession of one, the other not having been served with process, in a proceeding founded on such judgment to charge him not served with process, the other defendant is not a competent witness.<sup>3</sup>

§ 41. **Witness made Party by Mistake.**—Where, *through mistake*, and not by intention, the plaintiff in an action of tort joins as a defendant one of his own intended witnesses, the court will, on motion, even after issue joined, order his name stricken from the record in order to rehabilitate him as a witness in the cause;<sup>4</sup> and if the case be a criminal prosecution, a *nolle prosequi* will be ordered to be entered for the same purpose.<sup>5</sup> So, also, in ejectment, if one of the parties joined as defendant is a material witness for another defendant, he may suffer default, and thus become competent; but if he plead, by which act he will admit himself tenant in possession, his name will not be stricken out on motion.<sup>6</sup>

§ 42. **Common-Law Rule as to Defendants in Criminal Cases.**—In the absence of statutory modifications, the rules of the common law respecting the competency of parties as witnesses are virtually the same in criminal as in civil cases. In a criminal prosecution the State is the party plaintiff upon the record, though the prosecution is in most instances set on foot at the instigation of a private person, who is called the *prosecutor*. With regard to the competency of the prosecutor, we will speak hereafter, his disqualification, where it existed at common law, being based upon his indirect interest in the event of the prosecution, rather than upon his position as a party to the record.<sup>7</sup> In this place we will consider the

<sup>1</sup> *Purviance v. Dryden*, 3 Serg. & R. (Pa.) 402; *Stockham v. Jones*, 10 Johns. (N. Y.) 21; *Clark v. Malony*, 3 Harr. (Del.) 68; *Entriiken v. Brown*, 32 Pa. St. 364; *Baughner v. Culler*, 12 Md. 6.

<sup>2</sup> *Steigers v. Gross*, 7 Mo. 261; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118. To the contrary, *Parke v. Bird*, 3 Pa. St. 360.

<sup>3</sup> *Oakley v. Aspinwall*, 2 Sandf. (N. Y.) 7. See also *Lloyd v. Wil-*

*liams*, Cas. t. Hardw. 123; *Cotton v. Luttrell*, 1 Atk. 452; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Curtis v. Graham*, 12 Mart. (La.) 289.

<sup>4</sup> Bull. N. P. 285; *Berrington v. Fortesque*, Cas. t. Hardw. 162, 163.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* But see Bull. N. P. 286; *Mash v. Smith*, 1 Car. & P. 577; *Kimball v. Thompson*, 4 Cush. (Mass.) 441; *Reeves v. Matthews*, 17 Ga. 449.

<sup>7</sup> See *infra*, § 75.

competency of a defendant, at common law, as a witness on his own trial for a criminal offence. And in this connection it may be said that a sole defendant in a criminal case could not, at common law, testify at all:<sup>1</sup> it was only where two or more were jointly charged that one of them, in certain cases, was permitted to become a witness for the others, or for the prosecution, as the case might be.<sup>2</sup> Where the prosecution finds it expedient to call one of two or more jointly indicted defendants as a witness against the others, several courses are open in order to discharge him from the record, which must in all cases be done to render him competent.<sup>3</sup> This may be done: (1) by the entry of a *nolle prosequi*.<sup>4</sup> (2) By a verdict of acquittal where no evidence whatever has been given against the proposed witness, in which event he may be acquitted at the request of a co-defendant, and examined as a witness for the latter.<sup>5</sup> (3) By a verdict of acquittal rendered at the request of the prosecution, where such evidence as there is in the case against the defendant whose testimony is wanted, is not deemed sufficient to convict him. In this case the prosecution alone can ask an acquittal;<sup>6</sup> but his case having been submitted to the jury who find him not guilty, he should then be permitted to testify for his fellow-defendants.<sup>7</sup> (4) The same effect is produced where one of two or more persons jointly indicted submits and pleads guilty, and judgment is pronounced against him; for as to him, the prosecution is then at an end;<sup>8</sup> but he will not be

<sup>1</sup> *Whelchell v. State*, 23 Ind. 89; also *State v. West*, 69 Mo. 401; *Allen v. State*, 10 Ohio St. 287.  
*Harwell v. State*, 10 Lea (Tenn.) 544.

<sup>2</sup> As to the competency of a sole defendant by statute, see *infra*, Chap. IX.

<sup>3</sup> *Lemasters v. State*, 10 Ind. 391; *United States v. Clements*, 3 Hughes (U. S.) 509; *Moss v. State*, 17 Ark. 327; *Ballard v. Noaks*, 2 Ark. 45; *Adwell v. Commonwealth*, 17 B. Mon. (Ky.) 310; *State v. Young*, 39 N. H. 283; *People v. Bill*, 10 Johns. (N. Y.) 95; *People v. Donnelly*, 2 Park. (N. Y.) Cr. 182; *State v. Mills*, 2 Dev. (N. C.) L. 420; *Latshaw v. Territory*, 1 Oreg. 140; *Shay v. Commonwealth*, 36 Pa. St. 305.

<sup>4</sup> *Bull. N. P.* 285; *Cas. t. Hardw.* 163; *State v. Clump*, 16 Mo. 385. See

*United States v. Davidson*, 4 Cranch, C. C. 576. See also *Warfield v. State*, 35 Tex. 736; *United States v. Fenwick*, 4 Cranch, C. C. 676; *State v. Blannerhassett*, 1 Miss. 7; *State v. Roberts*, 15 Mo. 28; *Pennsylvania v. Leach*, Add. (Pa.) 352.

<sup>6</sup> *Rex v. Rowland*, Ry. & M. 401; compare *Pennsylvania v. Leach*, Add. (Pa.) 352.

<sup>7</sup> *Fitzgerald v. State*, 14 Mo. 413.

<sup>8</sup> *Rex v. Fletcher*, 1 Str. 633; *Reg. v. Lyons*, 9 Car. & P. 555; *Reg. v. Williams*, 8 Car. & P. 284; *State v. Jones*, 51 Me. 125; *Commonwealth v. Smith*, 12 Metc. (Mass.) 238; *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189.

admitted on his plea of guilty, unless judgment be actually rendered against him; for until then he is still a party to the record.<sup>1</sup> A suspension of sentence will not qualify him.<sup>2</sup> So, where two were jointly indicted for uttering a forged note, and the trial of one was postponed, it was held that he could not be called as a witness for the other.<sup>3</sup>

This rule of the common law is applicable to accessories as well as joint principals, where the indictment is joint.<sup>4</sup>

§ 43. **Effect of Separate Indictments, or Separate Trials.**—The rule was pretty well settled at common law, that where two or more persons were separately indicted for an offence in which all were implicated, either of them could be a witness for either of the others, on his separate trial;<sup>5</sup> and he might testify for the prosecution in such a case.<sup>6</sup>

In the case of the separate trial of two or more persons *jointly* indicted, the authorities are not harmonious, some of them holding one of them competent for the prosecution;<sup>7</sup> others permitting him to testify for his co-defendant,<sup>8</sup> and still others denying a defendant so situated the right to testify at all upon the separate trial of one united with him

<sup>1</sup> Henderson v. State, 70 Ala. 23.

<sup>2</sup> State v. Queen, 65 N. C. 464; State v. Bruner, Id. 499. See also Reg. v. Hinks, 1 Den. C. C. 84.

<sup>3</sup> Commonwealth v. Marsh, 10 Pick. (Mass.) 57.

<sup>4</sup> State v. Dunlop, 65 N. C. 288; Collier v. State, 20 Ark. 36. In Georgia, however, it was held that an accessory, joined in an indictment with the principal, may be called to testify for the State, but not for the principal. State v. Calvin, R. M. Charl. (Ga.) 151.

<sup>5</sup> United States v. Hunter, 1 Cranch, C. C. 446; United States v. Hanway, 2 Wall. Jr. (U. S.) 139; McKenzie v. State, 24 Ark. 636; Lucie v. State, 7 Baxt. (Tenn.) 148. In United States v. Hunter, *supra*, the witness was admitted although on trial at the same time with the other defendants, and before the same jury. In Texas, however, it is held that one indicted separately as a receiver cannot testify on the separate trial of the person charged with the theft. Crutchfield v. State, 7 Tex. App. 65.

<sup>6</sup> The King v. Moore, Jeff. (Va.) 8; Allison v. State, 14 Tex. App. 402.

<sup>7</sup> See Noyes v. State, 12 Vr. (N. J.) 418; Carroll v. State, 5 Neb. 31; Lee v. State, 51 Miss. 566; State v. Brien, 3 Vr. (N. J.) 414; Marler v. State, 67 Ala. 55.

<sup>8</sup> Marshall v. State, 8 Ind. 498; Sloan v. State, 9 Ind. 565; Hunt v. State, 10 Ind. 69; People v. Newberry, 20 Cal. 439; Jones v. State, 1 Ga. 610; George v. State, 39 Miss. 570; Lazier v. Commonwealth, 10 Gratt. (Va.) 708; State v. Spencer, 15 Ind. 249; State v. Stewart, 51 Iowa, 312; Marler v. State, 67 Ala. 55; Potecete v. State, 2 Leg. Rep. (U. S.) 151; s. c., 9 Baxt. (Tenn.) 261. And it has been held to be reversible error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. State v. Jenkins, 85 N. C. 544.

in the same indictment,<sup>1</sup> unless he has been previously tried and acquitted.<sup>2</sup>

§ 44. **Effect of examining Adverse Party as a Witness.**—The effect of calling one's adversary, at common law, was to render him a competent witness for all purposes;<sup>3</sup> even to testify against the party calling him, in a subsequent trial or proceeding in the same cause.<sup>4</sup> And it was held in an early case that if a complainant chooses to examine one of two defendants as a witness, on the trial of the cause, he cannot have a decree against him; and if, from the nature of the case, that defendant would be primarily liable to the complainant, and the other defendant liable only in a secondary degree, the complainant cannot have a decree against either;<sup>5</sup> but statutory changes in respect of the competency of parties as witnesses have, in most jurisdictions, rendered many of the cases we have been examining of little other than historical value.<sup>6</sup>

§ 45. **Competency of Judges and Arbitrators.**—While the judge or referee before whom a cause is tried is not, strictly speaking, a party thereto, still his intimate connection with the litigation is universally considered to render him an incompetent witness in that cause. If he sits alone, he cannot be sworn at all; and if he be one of several judges, he ought not to be, unless he leaves the bench during the trial.<sup>7</sup> In such cases the maxim that "no one shall be both judge and witness in the same cause" prevails, and it is even doubtful whether he can testify from his knowledge of common notoriety.<sup>8</sup>

Accordingly it has been held that a judge cannot be a witness as to matters which transpired before him on the trial

<sup>1</sup> *People v. Bill*, 10 Johns. (N. Y.) 95; *Collier v. State*, 20 Ark. 36; *State v. Nash*, 7 Iowa, 347; *State v. Dunlop*, 65 N. C. 288; *Staup v. Commonwealth*, 74 Pa. St. 458; *Kehoe v. Commonwealth*, 85 Id. 126; *Brown v. State*, 24 Ark. 620; *State v. Dumphrey*, 4 Minn. 438; *Baker v. United States*, 1 Id. 207; *State v. Edwards*, 19 Mo. 674; *People v. Williams*, 19 Wend. (N. Y.) 377; *State v. Martin*, 74 Mo. 547; *Rutter v. State*, 4 Tex. App. 57; *Crutchfield v. State*, 7 Tex. App. 65; s. c., 3 Tex. L. J. 169. Compare *Boothe v. State*, 4 Tex. App. 202.

<sup>2</sup> *Carpenter v. Crane*, 5 Blackf. (Ind.) 119; *Warfield v. State*, 35 Tex. 736.

<sup>3</sup> *Bennett v. Williams*, 57 Pa. St. 404.

<sup>4</sup> *Forrester v. Torrence*, 64 Pa. St. 29.

<sup>5</sup> *Ragan v. Echols*, 5 Ga. 71. See *Fulton Bank v. New York & C. Canal*, 4 Paige (N. Y.) 127.

<sup>6</sup> *Infra*, Chap. VIII.

<sup>7</sup> *Ross v. Buhler*, 2 Mart. (La.) n. s. 313; *Tait, Ev.* 432; *Morss v. Morss*, 4 Law Rep. n. s. 611; *People v. Miller*, 2 Park. (N. Y.) Cr. 197 (*h.*).

<sup>8</sup> 1 Greenl. Ev. (14th ed.) § 364, and note.

of another cause,<sup>1</sup> unless such matters were foreign and collateral to the issue on trial.<sup>2</sup>

So, also, except in cases of gross fraud, an arbitrator cannot be called as a witness to disclose the grounds of his award;<sup>3</sup> or to prove his own misconduct;<sup>4</sup> but he can testify to the time when, and the circumstances in which, he made his award;<sup>5</sup> or show a mistake in it;<sup>6</sup> or that any particular subject-matter was not taken into consideration by the arbitrators;<sup>7</sup> and his testimony is competent to show that no final award was made, and that, although he had signed it, yet, subsequently discovering a mistake therein, he never delivered it.<sup>8</sup> So, also, one agreed upon as an arbitrator, but who did not act as such, is competent;<sup>9</sup> and where the award is made by an umpire, it is held that one of the original arbitrators is competent to impeach it.<sup>10</sup>

<sup>1</sup> *Reg. v. Gazard*, 8 Car. & P. 595.

<sup>6</sup> *Pulliam v. Pensoneau*, 33 Ill. 375.

<sup>2</sup> *Rex v. Earl of Thanet*, 27 How. St. Tr. 847.

<sup>7</sup> *Mayor &c. v. Butler*, 1 Barb. (N. Y.) 325.

<sup>3</sup> 1 Story, Eq. Pl. 458, n. (1); 2 Story, Eq. Jur. 680; Anonymous, 3 Atk. 644; *Johnson v. Durant*, 4 Car. & P. 327.

<sup>8</sup> *Shulte v. Hennessy*, 40 Iowa, 352.

<sup>9</sup> *McFadden v. O'Donnell*, 18 Cal. 160.

<sup>4</sup> *Claycomb v. Butler*, 36 Ill. 100.

<sup>10</sup> *Mayor &c. v. Butler*, 1 Barb. (N. Y.) 325.

<sup>5</sup> *Woodbury v. Northy*, 3 Me. 85.



## CHAPTER V.

### COMMON-LAW RULE AS TO PERSONS INTERESTED IN THE EVENT.

- § 46. The General Rule excluding them.
- § 47. The Scope and Limits of the Rule.
- § 48. Operation of the Rule as to Witnesses whose Interest is balanced.
- § 49. ——— or preponderates against the Party calling them.
- § 50. ——— or who will testify against Interest.
- § 51. Witness Liable for Costs.

§ 46. **The General Rule excluding them.** — In England, prior to the passage of Lord Denman's act,<sup>1</sup> and in this country up to the times of the passage of the various enabling acts hereafter to be considered,<sup>2</sup> it was a general rule of the common law that direct and positive interest in the *event* of a cause, to however small a degree, rendered a witness incompetent to testify in that cause.<sup>3</sup> This rule was founded upon the supposed want of impartiality in the interested witness, and in his consequent temptation to commit perjury. But even in those jurisdictions where the rule was most inflexibly applied, the interest which would disqualify was required to be a certain and direct interest, and not merely a contingent or a consequential one.<sup>4</sup> Again, the interest was required to be in the *event* of the suit: an interest in the *question* invol-

<sup>1</sup> 6 & 7 Vict. c. 85.

<sup>2</sup> *Infra*, Chap. VIII.

<sup>3</sup> *Reece v. Johnson*, 1 Hempst. (U.S.) 82; *Bean v. Pearsall*, 12 Ala. 592; *Athey v. McHenry*, 6 B. Mon. (Ky) 50; *Nether-ton v. Robert*, 3 Hayw. (Tenn.) 29; *Revere v. Leonard*, 1 Mass. 93; *Bliss v. Thompson*, 4 Id. 488; *Common-wealth v. Snell*, 3 Id. 82; *Page v. Weeks*, 13 Id. 199; *Phelps v. Win-chell*, 1 Day (Conn.) 269; *Fairchild v. Beach*, Id. 266; *Kennon v. M'Rae*, 2 Port. (Ala.) 389; *Cotchet v. Dixon*, 4 McCord (S.C.) 311; *Evans v. Eaton*, 7 Wheat. (U.S.) 356; *M'Gee v. Eastis*, 5 Stew. & P. (Ala.) 426; *Wadhams v. Turnpike Co.*, 10 Conn. 416; *Woodard v. Spiller*, 1 Dana (Ky.) 179; *Henarie v. Maxwell*, 5 Hals. (N. J.) 297; *Spurr*

*v. Pearson*, 1 Mass. 104; *Shirk v. Van-neman*, 3 Yeates (Pa.) 196; *Fowler v. Collins*, 2 Root (Conn.) 231; *Evans v. Hettick*, 7 Wheat. (U. S.) 453; *Nass v. Vanswearinger*, 7 Serg. & R. (Pa.) 192; *Gould v. James*, 6 Cow. (N. Y.) 369; *Hoyt v. Wildfire*, 3 Johns. (N. Y.) 518; *Burton v. Hinde*, 5 T. R. 174; *Doe v. Tooth*, 3 Younge & J. 19.

<sup>4</sup> *Ely v. Forward*, 7 Mass. 25; *Phil-lips v. Bridge*, 11 Id. 242; *Worcester v. Eaton*, Id. 368; *Bean v. Bean*, 12 Id. 20; *Cornogg v. Abraham*, 1 Yeates (Pa.) 84; *Sims v. Sims*, 1 Treadw. (S. C.) Const. 131; *Lewis v. Manley*, 2 Yeates (Pa.) 200; *Poe v. Dorrah*, 20 Ala. 288; *Adams v. Barrett*, 3 Ga. 277; *Howard v. Brown*, Id. 523; *Har-vey v. Anderson*, 12 Ga. 69; *Jordan v.*

ved was not sufficient.<sup>1</sup> And it had to appear that the witness's interest was a legal and *beneficial* one. The test applied was whether the witness would gain or lose by the direct legal operation and effect of the judgment in the cause; or whether the record would be legal evidence for or against him in some other action.<sup>2</sup>

Thus the witness was excluded if the effect of his testimony would be to create or increase a fund in which he would be entitled to participate;<sup>3</sup> or prevent the diminution of such a fund;<sup>4</sup> or extinguish a debt owed by him.<sup>5</sup>

The disqualifying interest had to be a *legal* one, and not merely "the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social, or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility."<sup>6</sup> Thus the rule did not extend to agents, carriers, factors, brokers, or other servants, when offered to prove any acts done within the scope of their employment;<sup>7</sup> or to parent and child, guardian and ward, attorney and client, and the other personal and legal relations.<sup>8</sup> It made no difference, according to some of the cases, whether the interest was direct or indirect;<sup>9</sup> nor, if pecuniary, was the amount of any importance, the most trifling interest being as potent as the greatest.<sup>10</sup>

Pollock, 14 Ga. 145; Clarke v. Robinson, 5 B. Mon. (Ky.) 55; Smith v. White, 5 Dana (Ky.) 376; City Council v. Weikman, 1 Rich. (S. C.) 240; Smith v. White, 5 Dana (Ky.) 376; Marwick v. Georgia Co., 18 Me. 49; Blake v. Irish, 21 Me. 450; Dunbar v. Chevalier, 28 Miss. 161; Pickett v. Cloud, 1 Bailey (S. C.) 362; Ford v. McKibbin, 1 Strobb. (S. C.) 33; Smith v. Asbill, 2 Rich. (S. C.) 546; Hill v. Miller, 2 Swan (Tenn.) 659; Osborn v. Cummings, 4 Tex. 10; Bigham v. Carr, 21 Tex. 142.

<sup>1</sup> Williams v. Jones, 2 Ala. 314; Todd v. Boone County, 8 Mo. 431; Stewart v. Conner, 9 Ala. 803; Wright v. Lewis, 18 Ala. 194; Clapp v. Mandeville, 6 Miss. 197; Bass v. Peevey, 22 Tex. 295; Masters v. Varner, 5 Gratt. (Va.) 168.

<sup>2</sup> Eaton v. Gentle, 1 Chand. (Wis.) 10; 1 Stark. Ev. 102; Bent v. Baker,

3 T. R. 62; Bailey v. Lumpkin, 1 Ga. 392; Jones v. Post, 4 Cal. 14; State v. Poteet, 7 Ired. (N. C.) L. 356.

<sup>3</sup> Governor v. Justices, 20 Ga. 359; Foster v. Rutherford, Id. 676; Rome v. Dickerson, 13 Ga. 302; Cleverly v. McCullough, 2 Hill (S. C.) 445; Brown v. O'Brien, 1 Rich. (S. C.) 268; Johnson v. Alexander, 14 Tex. 382.

<sup>4</sup> Stebbins v. Sackett, 5 Conn. 258.

<sup>5</sup> Richardson v. Bartley, 2 B. Mon. (Ky.) 328.

<sup>6</sup> 1 Greenl. Ev. (14 ed.) § 386.

<sup>7</sup> Eaton v. Gentle, 1 Chand. (Wis.) 10.

<sup>8</sup> See, as to these, *infra*, §§ 53, 60, 69, 76.

<sup>9</sup> Kennedy v. Bossiere, 16 La. Ann. 445; McCall v. Smith, 2 McCord (S. C.) 375; Kimball v. Kimball, 3 Rawle (Pa.) 469.

<sup>10</sup> Hunter v. Gatewood, 5 Mon. (Ky.) 268; Scott v. McClellan, 2 Me. 199.

Any interest which could be asserted in a court of justice, whether a common law court or a court of equity, was enough to exclude the witness;<sup>1</sup> and the rule was carried so far as to exclude a witness who was interested in only a part of the plaintiff's demand, from testifying as to another part of it, in which he had, in fact, no interest.<sup>2</sup>

§ 47. **The Scope and Limits of the Rule.**—In view of the fact that both in England and America the mere interest of a witness in the event of the suit is no longer (except perhaps in one or two jurisdictions, and even in them to a limited extent) a disqualification, only a limited number of the multitude of cases illustrating the scope and limits of this rule of the common law will be cited. The writer's object is, primarily, to show what the law now is, and to that end he must exhibit its growth and history, but not necessarily cite some thousands of obsolete cases for that purpose.

*First* we may safely assert that the interest must be a *real* and not an *imaginary* or *apprehended* one. It is the *fact* of interest; its actual existence, and not the belief of the parties that it does exist, which will disqualify the witness.<sup>3</sup>

Accordingly it has been laid down that the declarations of a witness, made to others, that he is interested in the event of a suit, do not prove him to be so, or that he is an incompetent witness.<sup>4</sup>

Thus, a belief on the part of the witness that he is under an *honorary obligation* to the party calling him, in respect of the matter in controversy, will not disqualify him, however it may affect his credibility with the jury.<sup>5</sup> There is no lack

<sup>1</sup> Blum v. Stafford, 4 Jones (N. C.) L. 94.

<sup>2</sup> Gage v. Stewart, 4 Johns. (N. Y.) 293.

<sup>3</sup> 1 Phil. Ev. 127, 128; 1 Stark, Ev. 102; Gayle v. Bishop, 14 Ala. 552; McCabe v. Hand, 18 Cal. 496; Stallings v. Carson, 24 Ga. 423; Washington &c. Road v. State, 19 Md. 239; State v. Poteet, 7 Ired. (N. C.) L. 356; Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282; Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94; Stall v. Catskill Bank, 18 Id. 466; Coghill v. Boring, 15 Cal. 213; Elliott v. Porter, 8 Dana (Ky.) 299; Sims v. Sims, 3 Brev. (S. C.) 252.

<sup>4</sup> George v. Stubbs, 26 Me. 243; Nichols v. Holgate, 2 Aik. (Vt.) 138; Cole v. Cole, 33 Me. 542.

<sup>5</sup> Smith v. Downs, 6 Conn. 365; Orput v. Miller, 5 Blackf. (Ind.) 571; Union Bank v. Knapp, 3 Pick. (Mass.) 96, 108; Howe v. Howe, 10 N. H. 88; Gilpen v. Vincent, 9 Johns. (N. Y.) 219; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; Ludlow v. Union Ins. Co., 2 S. & R. (Pa.) 119; Long v. Bailie, 4 Id. 222; Coleman v. Wise, 2 Johns. (N. Y.) 165; Commonwealth v. Gore, 3 Dana (Ky.) 474; M'Causland v. Neal, 3 Stew. & P. (Ala.) 131; Frink v. McClung, 9 Ill. (4 Gilm.) 569; Carman v. Foster, 1 Ashm. (Pa.) 133;

of cases to the contrary of the above proposition, but the writer believes it to be the better opinion.<sup>1</sup>

Again, the interest (as we have seen in the preceding section) must be in the event of the litigation, and not merely in the question involved.<sup>2</sup> So also, the rule was, that if the witness could not gain or lose by the event of the suit, or if the verdict could not be given in evidence for or against him in another action, he was competent, his credibility only being affected.<sup>3</sup> Again, the disqualifying interest must be immediate and not remote,<sup>4</sup> and upon the very point of the case to which he is called to testify.<sup>5</sup> So also, it must have existed at the beginning of the suit, the rule being that a witness cannot deprive a party of his evidence, by creating a subsequent interest, by his own act, without the concurrence of the party calling him; much less can he do so by agreement with the opposite party.<sup>6</sup> And it must be direct and certain, or no matter what its character in other respects, it will go only to the credibility.<sup>7</sup>

*S. P. Havis v. Barkley*, Harp. (S. C.) 63; *Long v. Bailes*, 4 S. & R. (Pa.) 222; *State v. Clark*, 2 Tyler (Vt.) 278.

<sup>1</sup> *Plumb v. Whiting*, 4 Mass. 518; *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Peter v. Beall*, 4 Har. & M. (Md.) 342; *Sentney v. Overton*, 4 Bibb (Ky.) 445; *M'Veaugh v. Goods*, 1 Dall. 62; *Winn v. Cole*, 1 Miss. (Walk.) 119; *Johnson v. Kendall*, 20 N. H. 304; *Richardson v. Hunt*, 2 Munf. (Va.) 148.

<sup>2</sup> *Rollins v. Taber*, 25 Me. 144; *McLaren v. Hopkins*, 1 Paige (N. Y.) 18; *Estice v. Cockerell*, 26 Miss. 127; *Stoddard v. Mix*, 14 Conn. 12.

<sup>3</sup> *Van Nuys v. Terhune*, 3 Johns. (N. Y.) Cas. 82; *Coltart v. Laughinghouse*, 38 Ala. 190; *People v. Howell*, 4 Johns. (N. Y.) 296; *State v. Foster*, 3 McCord (S. C.) 442; *State v. Hassett*, 1 Tayl. (N. C.) 55.

<sup>4</sup> *Harbin v. Roberts*, 33 Ga. 45; *Fountain v. Anderson*, Id. 372; *McCaskey v. Graff*, 23 Pa. St. 321; *State v. Farrow*, 10 Rich. (S. C.) 165; *Richardson v. Dingle*, 11 Id. 405; *Linsley v. Lovely*, 26 Vt. 123; *Galbraith v. Scott*, 2 Dall. (U. S.) 95.

<sup>5</sup> *Shelton v. Tomlinson*, 2 Root

(Conn.) 132; *Smith v. Carrington*, 4 Cranch (U. S.) 62; *Bank of Utica v. Mersereau*, 3 Barb. (N. Y.) Ch. 528.

<sup>6</sup> *Hafner v. Irwin*, 4 Ired. (N. C.) L. 529; *Webb v. Danforth*, 1 Day (Conn.) 301; *Price v. Woods*, 7 T. B. Mon. (Ky.) 223; *Way v. Arnold*, 18 Ga. 181; *Baylor v. Smithers*, 1 Litt. (Ky.) 105; *Long v. Bailie*, 4 Serg. & R. (Pa.) 222; *McDaniel's will*, 2 J. J. Marsh. (Ky.) 331; *Rhem v. Jackson*, 2 Dev. (N. C.) L. 187; *Whiting v. Gould*, 1 Wis. 195; *Jones v. Hoskins*, 18 Ala. 489.

<sup>7</sup> *Day v. Green*, Hard. (Ky.) 117; *Stewart v. Kip*, 5 Johns. (N. Y.) 256; *Phelps v. Hall*, 2 Tyler (Vt.) 399; *Stockham v. Jones*, 10 Johns. (N. Y.) 21; *Ten Eyck v. Bill*, 5 Wend. (N. Y.) 55; *Burroughs v. United States*, 2 Paine (U. S.) 569; *Easley v. Easley*, 18 B. Mon. (Ky.) 86; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Cutter v. Fanning*, 2 Iowa, 580; *Frankfort Bank v. Johnson*, 24 Me. 490; *Melvin v. Melvin*, 6 Md. 541. But it has been held that an interest under an agreement, voidable by the statute of frauds, may render a witness incompetent, for *non constat* that the statute will ever be pleaded. *Robbins v. Butler*, 24 Ill. 387. And

There are early cases to be found in which the testimony of a witness was admitted no matter how clear, great, certain or immediate his interest was, where the parties consented to receive his testimony;<sup>1</sup> or where no other evidence could be obtained;<sup>2</sup> or where the object was to prove the facts and

see *Andre v. Bodman*, 13 Md. 241; *Scul v. Mason*, 43 Pa. St. 99; *Wentworth v. Crawford*, 11 Tex. 127.

In applying the rules stated in the text, it has been held that a contractor for a building could prove a materialman's lien against the owner (*Wolf v. Batchelder*, 56 Pa. St. 87. And see *Andre v. Bodman*, 13 Md. 241; *contra*, under the New York mechanics' lien law, *Collins v. Ellis*, 21 Wend. (N. Y.) 397); that one insurer could testify for another interested in the same policy (*Bent v. Baker*, 3 T. R. 27); or one seaman for another, in an action for wages where the defence affected the right of all the crew to recover (*Spurr v. Pearson*, 1 Mason (U. S.) 104; *Baker v. Corey*, 19 Pick. (Mass.) 496; *Hoyt v. Wildfire*, 3 Johns. (N. Y.) 518; *Murray v. Wilson*, 1 Binn. (Pa.) 531; *S. P. United States v. Freeman*, 4 Mason (U. S.) 505; *Burrows v. Reeves*, 1 Nott & M. (S. C.) 427); so the licensee of a patent may testify for the patentee, in an action for infringement (*Buck v. Hermance*, 1 Blatchf. (U. S.) 322; *De Rosnie v. Fairlie*, 1 M. & Rob. 457); and a person signing a notice and application for a road may prove the putting up of the notices (*Matter of Highway*, 3 Gr. (N. J.) 39); so may a notary who has omitted to notify an indorser testify in an action on the note by the holder against the indorser (*Johnson v. Harth*, 2 Bail. (S. C.) 183); and the same principle applies in the case of a master of one of two vessels in collision, — he may testify in the collision case, notwithstanding his liability over (*Crary v. Marshall*, 1 E. D. Smith (N. Y.) 530). Again, one landowner may testify for another claiming under the same title or by the same lines and corners (*Owings v. Speed*, 5 Wheat. (U. S.) 423; *Bulkley v. Storer*, 2 Day (Conn.) 531; *King v. Tarleton*, 2 Har. & M. (Md.) 473; *Parker v. Brown*, 15

N. H. 176; *Moody v. Fulmer*, 3 Grant (Pa.) 17; *Richardson v. Carey*, 2 Rand (Va.) 87. See also *Bean v. Smith*, 20 N. H. 461); otherwise, as to a mere occupant of the land (*Foust v. Trice*, 8 Jones (N. C.) L. 490; *Jackson v. Hills*, 8 Cow. (N. Y.) 290; *Strawbridge v. Cartledge*, 7 Watts & S. (Pa.) 394); and a creditor may testify for his debtor (*Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 575; *Benedict v. Brownson*, Kirby (Conn.) 70; *Heskett v. Borden Mining Co.*, 10 Md. 179; *Gicker v. Martin*, 50 Pa. St. 138. So may one devisee testify for another claiming under the same will (*Jackson v. Nelson*, 6 Cow. (N. Y.) 248 [see *infra*. § 61]); or one co-trespasser, for his associate in the trespass (*Walton v. Shelley*, 1 T. R. 301; *Clement v. Wafer*, 12 La. Ann. 599; *Dundas v. Muhlenberg*, 35 Pa. St. 351); and a stakeholder having paid over the money to the supposed winner, after notice to him by the loser not to do so, the person so receiving it is a competent witness for the loser, in an action by him against the stakeholder to recover it (*Ivey v. Phifer*, 13 Ala. 821).

So, also, in criminal cases the person injured by the offence is competent to prove its commission (*Fowler v. State*, 5 Day (Conn.) 81; *Kersh v. State*, 24 Ga. 191; *State v. McKennan*, Harp. (S. C.) 302) unless he be entitled to the fine or penalty (*Northcot v. State*, 43 Ala. 330; *State v. Vaughan*, 1 Bay (S. C.) 282. Compare *Handley v. Call*, 27 Me. 35); and the owner of stolen property may testify against the thief or receiver (*Gassenheimer v. State*, 52 Ala. 313; *Campbell v. Thompson*, 16 Me. 117; *Commonwealth v. Moulton*, 9 Mass. 30. See also *State v. Everest*, 1 Morr. (Iowa) 206; *State v. Pray*, 14 N. H. 464).

<sup>1</sup> *Allen v. Brown*, 5 Mo. 323.

<sup>2</sup> *Lamplsey v. Scott*, 24 Miss. 528.

circumstances necessary to lay a foundation for secondary evidence of a writing, as that a search had been made, and it could not be found.<sup>1</sup>

§ 48. **Operation of the Rule as to Witnesses whose Interest is balanced.**—Many of the earlier cases agree that where the interest of the witness is equal on both sides, or, as it is usually expressed, balanced, he is competent.<sup>2</sup> Thus, where he is liable in any event, and his testimony is to determine to which of the parties he is liable, he is a competent witness for either party.<sup>3</sup> This rule is applied in equity to the same extent as in actions at law.<sup>4</sup> But if the interest of the witness be not evenly balanced, but preponderates against the party calling him, he will be incompetent, for he is then interested for the excess;<sup>5</sup> and this rule holds even though the preponderance of interest be confined to a liability for costs.<sup>6</sup> Thus, in the case of a claimant of property taken on execution, in order that the execution debtor may be a witness, it must appear that the claimant deduces his title from the debtor, otherwise his interest is not balanced.<sup>7</sup> But an interest in a

<sup>1</sup> *Juzan v. Toulmin*, 9 Ala. 662; *Hill v. Barney*, 18 N. H. 607. See also *Baughner v. Culler*, 12 Md. 6.

<sup>2</sup> *Scott v. The Plymouth*, 6 McLean, 463; *The Plymouth*, 1 Newb. Adm. 56; *The Governor v. Gee*, 19 Ala. 199; *Elgin v. Hill*, 27 Cal. 372; *Cadwell v. Meek*, 17 Ill. 220; *Muchmore v. Jeffers*, 25 Ill. 199; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Montague v. Mitchell*, 28 Ill. 481; *Kennedy v. Evans*, 31 Ill. 258; *Rhodes v. Myers*, 16 La. Ann. 398; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *Adams v. Gardiner*, 13 Id. 197; *Ford v. McKibbin*, 1 Strobh. (S. C.) 33; *Thomasson v. Kennedy*, 3 Rich. (S. C.) Eq. 440; *Milward v. Hallett*, 2 Cai. (N. Y.) 77; *Stump v. Roberts*, *Cooke* (Tenn.) 350; *Nessly v. Swearingen*, Add. (Pa.) 144; *Alston v. Huggins*, 2 Treadw. (S. C.) Const. 688; *Standeford v. Chisholm*, 1 Stew. & P. (Ala.) 449; *Bridges v. Bell*, 13 Mo. 69.

<sup>3</sup> *Cushman v. Loker*, 2 Mass. 108; *Spence v. Mitchell*, 9 Ala. 744; *Lockett v. Child*, 11 Ala. 640; *Emerson v. Providence Hat Manufactory*, 12 Id. 237; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *Wright v. Nichols*, 1 Bibb (Ky.) 298; *Eldridge v. Wadleigh*, 12 Me. (3

*Fairf.*) 371; *Lightner v. Martin*, 2 McCord (S. C.) 214; *Miller v. Little*, 1 Yeates (Pa.) 26. Thus in an action, upon a policy of insurance, for the loss of the steamboat insured, the pilot at the wheel is a competent witness; for, if he is liable at all on account of his negligence, he will be liable to the losing party, whichever it may be (*Vairin v. Canal Ins. Co.*, 10 Ohio, 223).

<sup>4</sup> *Douglass v. Holbert*, 7 J. J. Marsh. (Ky.) 1; *Smalley v. Ellet*, 36 Ill. 500; *Miller v. McCan*, 7 Paige (N. Y.) 457. The following cases will serve to illustrate many of the circumstances under which the interest of a witness may be considered balanced: *Pyke v. Searcy*, 4 Port. (Ala.) 52; *Dearing v. Wyndham*, 11 Ala. 204; *Lewis v. Hodgdon*, 17 Me. 267; *Cutler v. Copeland*, 13 Me. 127; *Norton v. Waite*, 20 Me. 175; *Nute v. Bryant*, 31 Me. 553; *Abbott v. Cobb*, 17 Vt. 593. To cite others is unnecessary.

<sup>5</sup> *Gill v. Campbell*, 24 Tex. 405; *Dille v. Woods*, 14 Ohio, 122.

<sup>6</sup> *Scott v. McClellan*, 2 Me. 199; *Hubly v. Brown*, 16 Johns. (N. Y.) 70. See also *infra*, §§ 49, 51.

<sup>7</sup> *Yarborough v. Scott*, 5 Ala. 221.

witness in one way cannot be counterbalanced or outweighed by an equal or greater in the opposite, unless the latter is also direct and immediate.<sup>1</sup> Nor, where his interest is *prima facie* balanced, will the possibility that he may have a better defence against one side than the other, prevent his being sworn.<sup>2</sup>

§ 49. ——— or preponderates against the Party calling them. — So, also, the converse to the principle last stated is equally well sustained, viz. that if the interest of the witness preponderates *against* the party calling him, he is competent, for to exclude him on the ground of interest, he must appear to be interested *in favor* of the party who calls him<sup>3</sup> and not against him;<sup>4</sup> for in that case, if willing to testify (being a party), he is competent though objected to by his co-plaintiffs or co-defendants.<sup>5</sup> Thus, it is not a good objection to a witness offered by the defendant, that he has an interest in the plaintiff's recovery.<sup>6</sup>

§ 50. ——— or who will testify against Interest. — Mr. Greenleaf says: "It is hardly necessary to observe that, where a witness is produced to testify *against his interest*, the rule that interest disqualifies, does not apply, and the witness is competent."<sup>7</sup> This has, of course, been repeatedly so held

<sup>1</sup> Brown v. Johnson, 13 Gratt. (Va.) 644. Thus a person interested for both parties, but on one side directly and certainly, and on the other indirectly and contingently, is incompetent as a witness for the party in whom he is directly interested (Pool v. Myers, 21 Miss. 466).

<sup>2</sup> Starkweather v. Mathews, 2 Hill (N. Y.) 131.

<sup>3</sup> Sims v. Givan, 2 Blackf. (Ind.) 461; Kennedy v. Barnett, 1 Bibb (Ky.) 154; Jackson v. Vredenbergh, 1 Johns. (N. Y.) 159; Lansingburg v. Willard, 8 Id. 428.

<sup>4</sup> Stokes v. Kane, 5 Ill. (4 Scam.) 167; Turner v. Davis, 1 B. Mon. (Ky.) 151; Englehard v. Slater, 8 Miss. (7 How.) 538; Doe v. Jackson, 1 Sm. & M. (Miss.) 494; Haile v. Hill, 13 Mo. 612; Loftin v. Nally, 24 Tex. 565; Darling v. March, 22 Me. 184; Brown v. O'Brien, 1 Rich. (S. C.) 268; Alston v. Huggins, 3 Brev. (S. C.) 185; Le Clair v. Peterson, 4 Blackf. (Ind.) 273; Nooe v. Higdon, Id. 184.

<sup>5</sup> Parsons v. Phipps, 4 Tex. 341; Ware v. Bennett, 18 Tex. 794; Abbott v. Clark, 19 Vt. 444; Miner v. Downer, 20 Vt. 461; Paine v. Tilden, Id. 554; Sargeant v. Sargeant, 18 Vt. 371. Compare Smith v. Elder, 7 Sm. & M. (Miss.) 507.

<sup>6</sup> Ralph v. Brown, 3 Watts & S. (Pa.) 395. S. P. Horry v. Glover, Riley (S. C.) Ch. 53; but in such a case the plaintiff may also call him to testify as to other facts (Turner v. Waterson, 4 Watts & S. (Pa.) 171). On an issue between a judgment-plaintiff and a garnishee, relative to the ownership of money in the latter's hands, the judgment-debtor's interest is in the plaintiff's favor; and he may consequently testify for him (Tyler v. Coolbaugh, 7 Iowa, 474). So, also, a stockholder may testify in favor of the corporation, if his individual interest is adverse to that of the corporation (Canandarqua Academy v. McKechnie, 90 N. Y. 618).

<sup>7</sup> 1 Greenl. Ev. § 410.

where the testimony was voluntarily given;<sup>1</sup> but it has been held by a very respectable court, that an infant party *will not be permitted* to do so, even with the consent of his guardian *ad litem*;<sup>2</sup> and an early case in Illinois decides, that where a party in interest is not also a party to the record, he may, at the instance of the opposite party, be compelled to testify as a witness, against his own interest, provided his answers do not subject him to a criminal prosecution, or to a penalty or forfeiture.<sup>3</sup>

§ 51. **Witness Liable for Costs.**—The incompetency of a party to the record, arising out of his interest in the costs of the suit, has already been examined.<sup>4</sup> The effect of such an interest on the part of a witness not a party remains to be considered. The rule of the common law being that any interest in the event, however trifling, disqualified a witness, it was uniformly held that an interest in the costs of the litigation would exclude the witness.<sup>5</sup>

Thus, one who is, individually or with others, directly liable for costs in a cause, is not a competent witness to prove any fact which would relieve him from these costs;<sup>6</sup> and a liability for costs, in the event of a recovery on notes, prevents the person so liable from being a competent witness in a bill in equity to have the notes surrendered and cancelled.<sup>7</sup> Again, where persons, either before or after suit brought, agree to divide the amount recovered, they are liable to the defendant for costs, and cannot testify till the costs of the suit have been paid, though they execute mutual releases.<sup>8</sup> So, also, the counsel of a non-resident plaintiff,<sup>9</sup> or the indorser

<sup>1</sup> Cowles v. Whitman, 10 Conn. 121; Commercial Bank v. Wood, 7 Watts & S. (Pa.) 89; Brown v. Burke, 22 Ga. 574; Nooe v. Higdon, 4 Blackf. (Ind.) 184; Merchand v. Cook, 4 Greene (Iowa) 115; Sims v. Randal, 1 Brev. (S. C.) 85; Tuttle v. Turner, 28 Tex. 759; Gardner v. Gardner, 4 Heisk. (Tenn.) 303.

<sup>2</sup> Rickards v. Laus, 3 Harr. (Del.) 393.

<sup>3</sup> Brooks v. McKinney, 5 Ill. 309.

<sup>4</sup> *Supra*, § 29.

<sup>5</sup> Bill v. Porter, 9 Conn. 23; Benedict v. Brownson, Kirby (Conn.) 70; Craven v. Updike, 3 Blackf. (Ind.) 272; Beach v. Swift, 2 Conn. 269;

Vason v. Merchants' Bank, 2 Ga. 140; Wilkes v. McClung, 29 Ga. 371; Cherry v. McCorkle, 8 Iowa. 522; Allison v. Allison, 7 Dana (Ky.) 90; Bullitt v. Stewart, 16 La. Ann. 22; Cason v. Robson, 29 Miss. 97; Bennet v. Carter, Riley (S. C.) 287; Bennett v. Dowling, 22 Tex. 660.

<sup>6</sup> Ware v. Jordan, 21 Ala. 837.

<sup>7</sup> Person v. Sanger, 1 Woodb. & M. (U. S.) 138.

<sup>8</sup> Mackinley v. McGregor, 3 Whart. (Pa.) 370.

<sup>9</sup> Robinson v. Towns, 30 Ga. 818. But it was decided in New York that a partner with the plaintiff's attorney, who is interested in the costs,



of a writ,<sup>1</sup> being liable for the costs, cannot testify in the suit. And where witnesses for the plaintiff of record sue a third person for their fees, the plaintiff of record, being *prima facie* liable for such fees, is incompetent as a witness for the plaintiffs.<sup>2</sup> But the interest of the witness in these cases could be released, and the witness rendered competent. Thus where the surety in a bond for costs was required as a witness, the plaintiff could substitute a new bond, release the surety, and use him as a witness;<sup>3</sup> and where a witness was objected to as the indorser of the writ, the plaintiff residing out of the State, he was made competent by a stranger's voluntarily depositing a sum of his own money, sufficient to cover the costs, with the clerk, in the absence and without the knowledge of the plaintiff.<sup>4</sup>

and probably expects higher fees as counsel in case of success, is not therefore an incompetent witness (*Griswold v. Sedgwick*, 1 Wend. (N. Y.) 126. See also *Patton v. Taylor*, 7 How. (U. S.) 132).

<sup>1</sup> *Ammidown v. Woodman*, 31 Me. 580.

<sup>2</sup> *Utt v. Long*, 6 Watts & S. (Pa.) 174. In this case, the plaintiff of rec-

ord having died insane, it was held that his executor was a competent witness in the latter action, the estate being sufficient to pay the fees. See also *Hopkinson v. Guildhall*, 19 Vt. 533; *Cowles v. Rowland*, 2 Jones (N. C.) L. 219.

<sup>3</sup> *Hoys v. Tuttle*, 8 Ark. 124.

<sup>4</sup> *Ammidown v. Woodman*, 31 Me. 580.

## CHAPTER VI.

### VARIOUS ILLUSTRATIONS OF THE RULE AS TO PARTIES AND PERSONS INTERESTED.

- § 52. Assignor or Assignee.
- § 53. Attorneys.
- § 54. Bail.
- § 55. Bailor or Bailee.
- § 56. Bankrupts.
- § 57. Debtor or Creditor.
- § 58. Donor or Donee.
- § 59. Grantor or Grantee.
- § 60. Guardian or Ward.
- § 61. Heirs, Devisees, Legatees, and Next of Kin.
- § 62. Jurors, Grand and Petit.
- § 63. Landlord or Tenant.
- § 64. Mortgagor or Mortgagee.
- § 65. Negotiable Paper, Parties to.
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- § 67. Obligor and Obligee.
- § 68. Officers.
- § 69. Parent or Child.
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- § 72. Personal Representatives.
- § 73. Principal or Agent.
- § 74. Principal or Surety.
- § 75. Prosecutors and Informers.
- § 76. Servants.
- § 77. Shareholders and Corporate Officers.
- § 78. Trustee or *Cestui que Trust*.
- § 79. Usurious Contracts, Parties to.
- § 80. Vendor and Purchaser of Lands.
- § 81. ——— of Personal Property.
- § 82. Warrantors.

§ 52. **Assignor or Assignee.**—(1) *Assignor*. Where the assignor of a chose in action is not a party to the record, it must be shown in order to disqualify him as a witness, that the assignment was made for the purpose of making him a witness to support the claim; and if there are circumstances of that character, it lies on the party objecting to

show them.<sup>1</sup> He is a good witness if he has no interest.<sup>2</sup> Even where the assignment is made during the pendency of the suit, and, by order of court made without objection on the part of the defendant, the assignee is substituted in the action for the assignor, and no security for costs is ordered, all claim upon the original plaintiff for costs is waived, and the assignor is a competent witness for the assignee.<sup>3</sup>

On the other hand, it was repeatedly held at common law, that the assignor of a chose in action, or unliquidated claim, was incompetent to testify in an action thereon,<sup>4</sup> unless released from the implied warranty which arises in all cases of assignment for a valuable consideration, that the debt is due.<sup>5</sup> And he cannot establish such release by his own testimony, especially where the assignment is merely colorable, made only for the purpose of enabling him to testify, and with the clear intent that he shall receive the benefit of the recovery.<sup>6</sup>

(2) *Assignee.* As respects the competency of an *assignee* of a chose in action, it has been held that he is competent if

<sup>1</sup> *Roshing v. Chandler*, 3 Pa. St. 375. But see *Parish v. Frampton*, 32 Mo. 396; *Hendricks v. Ebbitt*, 37 Mo. 24.

<sup>2</sup> *Fetterman v. Plummer*, 9 S. & R. (Pa.) 20. So held of one who assigned a claim to a creditor, on account of his debt, without any agreement that any part of the debt should be thereby extinguished (*Bridges v. Hyatt*, 10 N. Y. 546. See also *Cobb v. Baldwin*, 1 Root (Conn.) 534; *Watson v. Smith*, 13 Wend. (N. Y.) 51. S. P. *Platt v. Hedge*, 8 Iowa, 386, 392. But see *Wilkins v. Stidger*, 22 Cal. 231).

<sup>3</sup> *Warner v. Turner*, 18 B. Mon. (Ky.) 758. Compare *Freeman v. Jennings*, 7 Rich. (S. C.) 381. The assignor of a bond may show that he obtained it fraudulently (*Baring v. Shippen*, 2 Binn. (Pa.) 154). The assignor of a judgment may testify in a suit thereon (*Doub v. Barnes*, 1 Md. Ch. 127; *Himblewright v. Armstrong*, 25 Pa. St. 428. But see *Burrows v. Shultz*, 6 Pa. St. 325). So may the assignor of a mortgage (*Grosvenor v. Atlantic Fire Ins. Co.*, 1 Bosw. (N. Y.) 469; *McConnell v. McCracken*, 14 Wis. 83); or the assignor of a note (*Johnson v. Black-*

*mar*, 11 Conn. 324; *Weil v. Tyler*, 38 Mo. 558; *Taylor v. Gitt*, 10 Pa. St. 428; *Caton v. Lenox*, 5 Rand. (Va.) 31. But see *Woolfolk v. M'Dowell*, 9 Dana (Ky.) 268; or of a policy of insurance (*Bidwell v. St. Louis & C. Ins. Co.*, 40 Mo. 42).

<sup>4</sup> *Reading Railroad v. Johnson*, 7 Watts & S. (Pa.) 317; *Clifton v. Sharpe*, 15 Ala. 618; *Houston v. Pre-witt*, 8 Ala. 846; *Muirhead v. Kirkpatrick*, 2 Pa. St. 425; *Adams v. Woods*, 8 Cal. 306; *Cox v. Davis*, 16 Ind. 378; *Swails v. Coverdill*, 17 Ind. 337; *Ketcham v. Hill*, 42 Ind. 64; *Woodruff v. Cox*, 2 Bradf. (N. Y.) 223; *London & C. Soc. v. Hagarstown & C. Bank*, 36 Pa. St. 498; *Howerton v. Holt*, 23 Tex. 51.

<sup>5</sup> *Ludwig v. Meyre*, 5 Watts & S. (Pa.) 435; *Delce v. Sandel*, 12 La. Ann. 208.

<sup>6</sup> *Bell v. Drew*, 4 E. D. Smith (N. Y.) 59; *Post v. Avery*, 5 Watts & S. (Pa.) 509. So held where before the assignment was made he pledged himself to testify for the assignee (*Patterson v. Reed*, 7 Watts & S. (Pa.) 144. S. P. *Phinney v. Tracy*, 1 Pa. St. 173; *Sypher v. Long*, 4 Watts (Pa.) 253).

his testimony does not tend to support the title of the party calling him.<sup>1</sup> But where such assignee re-assigns, neither he nor his assignee can testify.<sup>2</sup> And where a judgment which has been assigned is afterwards reversed, and remanded for further proceedings, the assignee, being interested, cannot testify for the plaintiff.<sup>3</sup> So one to whom a promissory note is assigned as a pledge, is incompetent to testify for the assignor in an action on the note.<sup>4</sup>

In the case of an assignment in bankruptcy, or insolvency, or for the benefit of creditors, it is well settled that the assignor is a competent witness in an action relating to the property by the assignee, the suit not being for the immediate benefit of the assignor,<sup>5</sup> especially where he has released the assignee from all claims to a surplus.<sup>6</sup>

§ 53. **Attorneys.**—It is not the purpose of the writer to consider here any of the cases which have to do with confidential communications between attorney and client, or the admissibility of the testimony of an attorney as to matters involving the relationship between him and his client;<sup>7</sup> but simply to examine the decisions which pass upon the question of an attorney's competency or incompetency, as a witness interested in the event of the litigation.

Mr. Greenleaf says: "In regard to *attorneys*, it has in England been held a very objectionable proceeding on the part of an attorney to give evidence when acting as advocate in the cause, and a sufficient ground for a new trial.<sup>8</sup> But in the United States no case has been found to proceed

<sup>1</sup> *Wilson v. Speed*, 3 Cranch (U. S.) (S. C.) 413; *Gilchrist v. Martin*, 1 283. Bail. (S. C.) Ch. 492.

<sup>2</sup> *Grayson's Appeal*, 5 Pa. St. 395; *Greene v. Durfee*, 6 Cush. (Mass.) 362; *Jaques v. Marquand*, 6 Cow. (N. Y.) 497; *Bussy v. Ady*, 3 Har. & M. (Md.) 97; *Price v. Caperton*, 1 Duv. (Ky.) 207; *Faunce v. Leslie*, 6 Pa. St. 121. For cases in which the competency of an assignee in bankruptcy or insolvency is considered, see *Benoist v. Darby*, 12 Mo. 196; *Swampscot Mach. Co. v. Walker*, 22 N. H. 457; *Bean v. Brackett*, 34 N. H. 102; *Robb's Appeal*, 41 Pa. St. 45.

<sup>3</sup> *Stewart v. Conner*, 13 Ala. 94.

<sup>4</sup> *Harbin v. Roberts*, 33 Ga. 45. To the contrary, *Locke v. N. Amer. Ins. Co.*, 13 Mass. 61.

<sup>5</sup> *Jones v. Church of Rochester*, 21 Barb. (N. Y.) 161; *Krum v. Beard*, 31 Mo. 505; *Allen v. Hudson & c. Ins. Co.*, 19 Barb. (N. Y.) 442; *Legee v. Burbank*, 2 E. D. Smith (N. Y.) 419. But see *Fitch v. Bates*, 11 Barb. (N. Y.) 471; *Sharp v. Long*, 28 Pa. St. 433; *Caulfield v. Sanders*, 17 Cal. 569; *Lockwood v. Canfield*, 20 Cal. 126; *Pinchback v. Killian*, 9 Rich.

<sup>7</sup> See *infra*, § 271.

<sup>8</sup> Citing *Dunn v. Packwood*, 11 Jur. 242, *a.*

to that extent; and the fact is hardly ever known to occur.”<sup>1</sup>

In a very early Connecticut case it is held that an attorney who *has transacted the business* for the plaintiff is a competent witness for him;<sup>2</sup> and there is no lack of decisions which allow him to testify in the very case he is managing.<sup>3</sup> Thus, he may testify that the note sued on is lost, and that the copy annexed to the petition is a true copy;<sup>4</sup> or that he has been authorized to appear for the party whom he claims to represent.<sup>5</sup> So, he may testify as to the value of the services of another attorney, whom he has heard try cases;<sup>6</sup> or to disprove the alleged champertous character of a contract made by him.<sup>7</sup> So, also, he may testify as to what a witness since deceased swore to on a former trial in which he acted as counsel.<sup>8</sup> And the fact that he has opened his client's case and cross-examined witnesses, does not render him incompetent as a witness for his client.<sup>9</sup> In Alabama, it is held that if the attorney is to receive a certain fee, and not a contingent or unliquidated one, he is competent for his client.<sup>10</sup>

<sup>1</sup> 1 Greenl. Ev. (14 Ed.) § 364. This was very true at the time Mr. Greenleaf wrote, but it seems strange that some of his annotators have not noticed the subsequent accumulation of American cases upon the point.

<sup>2</sup> Smith v. Huntington, 1 Root (Conn.) 226.

<sup>3</sup> Buckmaster v. Kelley, 15 Fla. 180; Willis v. West, 60 Ga. 613; Morgan v. Roberts, 38 Ill. 65; Succession of Grant, 14 La. Ann. 795; Beatty v. Davis, 9 Gill (Md.) 211; Potter v. Ware, 1 Cush. (Mass.) 519; Beall v. Territory, 1 New Mex. 507; State v. Woodside, 9 Ired. (N. C.) L. 496; Bell v. Bell, 12 Pa. St. 235; Johns v. Bolton, Id. 339; Linton v. Ford, 46 Id. 294; Rea v. Trotter, 26 Gratt. (Va.) 585.

<sup>4</sup> Abbott v. Stribley, 6 Iowa, 191.

<sup>5</sup> Tullock v. Cunningham, 1 Cow. (N. Y.) 256; Gaul v. Groat, Id. 113; Pixley v. Butts, 2 Id. 421; Cox v. Hill, 3 Ohio, 411.

<sup>6</sup> Beckman v. Platner, 15 Barb. (N. Y.) 550.

<sup>7</sup> Benton v. Henry, 2 Coldw. (Tenn.) 83.

<sup>8</sup> State v. Cook, 23 La. Ann. 347.

<sup>9</sup> Follansbee v. Walker, 72 Pa. St. 228. In Louisiana, the rule is, that though, under the laws of that State, an attorney is competent for his client, his position as a witness is one of extreme delicacy for himself and the court; and it is always desirable, for the harmony of the profession, the independence of the bench, and public confidence in the administration of justice, that he should not testify except in extreme cases when all other means of proof are impossible; and then he should withdraw from the case. Succession of Harkins, 2 La. Ann. 923; Blanc v. Forgay, 5 Id. 695; Madden v. Farmer, 7 Id. 580; Boissy v. Lacon, 10 Id. 29. See also Mullen v. Scott, 9 La. Ann. 174, where it is said that an attorney is not an agent of his client within the rule which admits agents for their principals.

<sup>10</sup> Morrow v. Parkman, 14 Ala. 769; McGehee v. Hansell, 13 Ala. 17; Quarles v. Waldron, 20 Ala. 217; even though he holds a note for his fee (Mosser v. Mosser, 32 Ala. 551). In

On the other hand, where the attorney is plainly interested in the recovery, he is incompetent; as, where he is liable for costs, his client being a non-resident plaintiff;<sup>1</sup> but if he be indemnified, he may testify;<sup>2</sup> and the same is the case where the contract rendering him interested has been rescinded.<sup>3</sup> If his fee is dependent on the success of his client, he cannot testify if the opposite party objects.<sup>4</sup> Nor is he competent if he is to receive a percentage on the amount recovered; at least, such seems to be the law in Kentucky and Louisiana.<sup>5</sup>

If the defence to the action is some negligent or other wrongful act or omission on the part of the plaintiff's attorney, his contingent liability over to his client will not render him incompetent on the ground of interest.<sup>6</sup> So it has been held that the mere fact that an attorney neglected to appear and defend a suit, as requested by his client and in pursuance of a retainer, will not disqualify him as a witness

a very recent case in Wisconsin, four witnesses called by appellant to establish a material fact, were attorneys. One of them was one of his attorneys of record; but when, upon the trial, it was determined that his testimony was material to his clients, the defence of the action was entrusted to another attorney not theretofore concerned in the case. Two others had been clerks in the office of appellant's attorneys during the transactions out of which the action arose, but were not attorneys in the case; and the fourth was an attorney for a party whose interests were adverse to those of appellant. The judge, in charging the jury, said that he "did not know that any court had ever decided that a lawyer cannot tell the truth, but the courts have always deprecated the fact of attorneys being witnesses in a case." He then added other remarks from which the jury might naturally infer that the several attorneys who had testified for the appellants, had acted unprofessionally in so doing. It was held that this charge was misleading and erroneous. (*Connolly v. Straw*, 53 Wis. 645.) See also *M'Laine v. Bachelor*, 8 Mc. 324; *Clark v. Kingsland*, 9 Miss. 248; *Foster v. Newbrough*, 66 Barb. (N. Y.)

645; *Simonton v. Yongue*, 3 Strobb. (S. C.) 538.

<sup>1</sup> *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358. So held where another person indorsed the writ *at the request* of the attorney (*Meserve v. Hicks*, 24 N. H. 295). But his *lien for costs* will not disqualify him (*Sherman v. Scott*, 27 Hun (N. Y.) 331).

<sup>2</sup> *Chaffee v. Thomas*, *supra*.

<sup>3</sup> *McLaughlin v. Shields*, 12 Pa. St. 283.

<sup>4</sup> *Dailey v. Monday*, 32 Tex. 141.

<sup>5</sup> *Commonwealth v. Moore*, 5 J. J. Marsh. (Ky.) 655; *Hall v. Acklen*, 9 La. Ann. 219. At the present day the contingent character of the fee would probably be no obstacle. In North Carolina, the fact that he intends to charge a commission for receiving and remitting the amount recovered, if any, was held not to disqualify him (*Slocum v. Newby*, 1 Murph. (N. C.) 423).

<sup>6</sup> *Braine v. Spalding*, 52 Pa. St. 247; *Orphan's Court v. Woodburn*, 7 Watts & S. (Pa.) 162. He can explain who were intended to be embraced in a confession of judgment drawn by him; but he cannot attack the validity of such judgment (*McBride v. Bryan*, 67 Ga. 584).

for such client in another suit, in the absence of proof that there was an available defence to the first suit, and that the defendant therein suffered damage by reason of the attorney's negligence.<sup>1</sup>

Thus we see that the weight of authority, both early and recent, is to the effect that an attorney is a competent witness for his client, as against the mere objection that the relationship of attorney and client exists between the witness and the party; but as to the *impropriety* of his entering the witness-box for such a purpose, unless in a case of extreme necessity, there can be little difference of opinion. Indeed, he has, in some instances, been *denied the right* to do so.<sup>2</sup> His attitude as both advocate and witness subjects his testimony to suspicion and criticism.<sup>3</sup> He should employ another attorney to institute the action in which he expects to be a witness;<sup>4</sup> or withdraw from the case, when in the course of the trial his testimony becomes necessary to the protection of his client's interests.<sup>5</sup>

§ 54. **Bail.**—Persons who have become liable as bail for a defendant have been held to be so far interested in the event as to be incompetent witnesses for him; for their liability becomes immediate if the judgment be against their principal, and is removed altogether by a judgment in his favor.<sup>6</sup> And the rule is the same where the bail deposit a sum of money with the proper officer, to secure the defendant's appearance.<sup>7</sup> Thus a surety on a bond, given by one of two joint debtors arrested on mesne process, to procure his release, is not competent as a witness for the defendants on the trial of the suit.<sup>8</sup> But in Wisconsin, it was held in an early case that the bail of one indicted for seduction was not disqualified to be a witness for the defendant on that ground.<sup>9</sup>

Under the English common-law practice, if a defendant

<sup>1</sup> Carrington v. Holabird, 17 Conn. 530.

<sup>2</sup> Stones v. Byron, 4 Dowl. & L. 393; Dunn v. Packwood, 11 Jur. 242; Mishler v. Baumgardner, 1 Am. L. J. n. s. 304; 1 Greenl. Ev. (14 ed.) § 386.

<sup>3</sup> Ross v. Demoss, 45 Ill. 447.

<sup>4</sup> Walsh v. Murphy, 2 Greene (Iowa) 227.

<sup>5</sup> Succession of Harkins, 2 La. Ann. 923; Blanc v. Forgay, 5 Id. 695; Mad-

den v. Farmer, 7 Id. 580; Boissy v. Lacon, 10 Id. 29.

<sup>6</sup> Lacon v. Higgins, 1 T. R. 164; 3 Stark, 182; Niles v. Brackett, 15 Mass. 378.

<sup>7</sup> Lacon v. Higgins, *supra*.

<sup>8</sup> Cates v. Noble, 33 Me. 258. Compare *Ex parte Hinton*, 3 Rich. (S. C.) 97.

<sup>9</sup> Andrews v. State, 4 Wis. 385. See also Stow v. Sewall, 3 Stew. & P. (Ala.) 67; Butler v. Warren, 11 Johns. (N. Y.) 57; Bell v. Cowgell, 1 Ashm. (Pa.) 7.

desired to examine his bail, the court, on motion, would strike out his name from the bail-piece, on the substitution and justification of another surety, or the deposit in court of a sufficient sum.<sup>1</sup> Again, the bail may be rendered competent by the surrender of the principal.<sup>2</sup>

§ 55. **Bailor or Bailee.**—(1) *Bailor.* The competency of a bailor at common law, when plaintiff in an action against the bailee, has already been examined.<sup>3</sup> We will now consider the admissibility of the testimony of the bailor, when, not being a party, he is called as a witness by the bailee; and then examine as to the competency of the bailee for the bailor, under similar circumstances.

It is, of course, self-evident, that the bailor may be a witness for the bailee, if he has no interest in the event of the suit; and it has been so held.<sup>4</sup> So, in a suit by a bailee of goods, against a carrier, for negligence resulting in the loss or damage of the goods, the bailor, having released the plaintiff, may testify for him.<sup>5</sup> But it has been held that in an action of trover, by the bailee of a chattel against a stranger, the bailor is not a competent witness for the bailee to prove the general property in himself.<sup>6</sup>

(2) *Bailee.* So, on the other hand, where the bailor is the plaintiff, if the bailee is guilty of a conversion, by selling the goods to the defendant, he is a competent witness for the plaintiff, his interest being exactly balanced.<sup>7</sup> *A fortiori* he is competent where the goods were forcibly taken from him by the defendant, and the bailor sues to recover them.<sup>8</sup> So, also, he may prove the bailor's title where the goods are levied on in his hands as his own property.<sup>9</sup>

§ 56. **Bankrupts.**—A bankrupt, not being a party to the suit in which he is called to testify, or having any legal interest in the event, is a competent witness,<sup>10</sup> even though

<sup>1</sup> Tidd, Pr. 259; *Baillie v. Hole*, 3 Car. & P. 560; s. c., 1 Moo. & M. 289; *Whartley v. Fearnley*, 2 Chit. 103.

<sup>2</sup> See *Pearcey v. Fleming*, 5 Car. & P. 503; *Comstock v. Paie*, 3 Rob. (La.) 440; *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Beckley v. Freeman*, 15 Id. 468; *Tompkins v. Curtis*, 3 Cow. (N. Y.) 251.

<sup>3</sup> *Supra*, § 27.

<sup>4</sup> *Maine Stage Co. v. Longley*, 14 Me. 444.

<sup>5</sup> *Moran v. Portland Steam Packet Co.*, 35 Me. 55. Compare *Nelson v. Iverson*, 24 Ala. 9.

<sup>6</sup> *Chesley v. St. Clair*, 1 N. H. 189. *S. P.* *Heitzman v. Divil*, 11 Pa. St. 264.

<sup>7</sup> *Oliver v. McClellan*, 21 Ala. 675. See *supra*, § 48. *Contra*, *Pierce v. Hinsdall*, 1 Tyler (Vt.) 153.

<sup>8</sup> *Wright v. Ross*, 2 Greene (Iowa) 263.

<sup>9</sup> *Walmsley v. Hubbard*, 24 Tex. 612.

<sup>10</sup> *Boas v. Hietzel*, 3 Pa. St. 298.



his assignee be a party;<sup>1</sup> and if he has received his discharge, and is sued jointly with others, he is a competent witness for the plaintiff, if without interest; and the fact that the plaintiff consented to his discharge makes no difference.<sup>2</sup> So, also, if discharged from a debt, and his sureties for that debt are sued, he may testify for them to show usury in the contract.<sup>3</sup> Where the bankrupt is discharged from all liability or interest in the subject-matter of a subsequent suit, he may testify therein, even though the demand upon which the suit is founded was omitted, without fraud, from his schedules.<sup>4</sup> And he may testify as to the correctness of his schedules in such a case.<sup>5</sup> But where his assignee is a party, and the object of the suit is to increase the assets, it must appear that the bankrupt witness has no claim to or interest in the surplus, if any, of the bankrupt estate, and that he has received his allowance;<sup>6</sup> or else he must release,<sup>7</sup> or offer to release,<sup>8</sup> his assignee from all claim to surplus and allowance.

It must be understood that the incompetency of the witness for interest in the subject-matter of the suit is not removed by the adjudication in bankruptcy; only the discharge does this.<sup>9</sup> And where the adjudication is made pending a suit to which the bankrupt is a party, his discharge will not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. Such liability, therefore, excludes him from being a witness in such suit, on the ground of interest.<sup>10</sup>

<sup>1</sup> Wright v. Rogers, 3 McLean (U. S.) 229.

<sup>2</sup> Onion v. Fullerton, 19 Vt. 317.

<sup>3</sup> Morse v. Hovey, 1 Sandf. (N. Y.) Ch. 187; Fellows v. American Life Ins. and Trust Co., Id. 203; Morse v. Cloyes, 11 Barb. (N. Y.) 100. See also Carman v. White, 4 Humph. (Tenn.) 301.

<sup>4</sup> Strong v. Clawson, 10 Ill. 346.

<sup>5</sup> West v. Creditors, 1 La. Ann. 365.

<sup>6</sup> Oldham v. McCormick, 8 Blackf. (Ind.) 387; Coleman v. Tebbetts, 20 N. H. 408. See also Houston v. Pre-witt, 8 Ala. 846.

<sup>7</sup> Cully v. Ross, 7 Blackf. (Ind.) 312; Dean v. Speakman, Id. 317.

<sup>8</sup> Frow v. Downman, 11 Ala. 880; Bridges v. Armour, 5 How. (U. S.) 91; Coit v. Owen, 3 Desau. (S. C.) 175.

Otherwise where his testimony would tend to decrease the assets (Colgin v. Redmond, 20 Ala. 650).

<sup>9</sup> Dickinson v. Codwise, 1 Sandf. (N. Y.) Ch. 214.

<sup>10</sup> Bridges v. Armour, 5 How. 91. The authorities upon the point here decided are not harmonious. The case of Haswell v. Thorogood, 7 Barn. & C. 705, was decided in the King's Bench in 1828. Tenterden, Ch. J., said: "The rules deducible from all the cases are laid down in Mr. Deacon's *Treatise on the Law of Bankruptcy*; and, after stating the rules applicable to cases where the plaintiffs have obtained verdicts, and the defendants have become bankrupt before judgment, he says: 'With respect to costs upon a judgment of nonsuit, the statute (6

§ 57. **Debtor or Creditor.**—(1) *Debtor.* The general rule of the common law is, that a debtor, even though a party to the record, is not disqualified, by reason of interest, from

Geo. IV. c. 16) is wholly silent, making no provision whatever for the proof of a defendant's costs, whether on a judgment of nonsuit or judgment after verdict. It was, indeed, formerly determined that where the nonsuit was before the bankruptcy of the plaintiff the costs might be proved, though the judgment was not obtained till afterwards, on the ground that the costs related back to the nonsuit, by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be found only in two cases, which were impugned by Lord Eldon in *Ex parte Hill*, 11 Ves. 646, and which were overruled in *Ex parte Charles*, 14 East, 197. And it has since been decided, that, where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judgment is signed (*Walker v. Barnes*, 5 Taunt. 778).<sup>1</sup> That is, I think, a correct statement of the decisions upon the subject. Now here the plaintiff becomes a bankrupt after the nonsuit, but before judgment was signed. The costs of the cause did not constitute any debt until judgment was signed; for there is no distinction, in this respect, between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles a defendant to tax his costs; but no debt arises, and no action can be maintained for them, until judgment is signed. The case of *Walker v. Barnes* is a decisive authority to show that the amount of these costs could not be proved as a debt under the plaintiff's commission; and if that be so, then he is liable to pay them. As to the costs of the reference, there can be no question. They clearly did not constitute a debt provable under the commission."

In 1831 the same conclusion was reached in the Common Pleas (*Brough v. Adcock*, 7 Bing. 650). Where the debt arose before bankruptcy, but a verdict was obtained and costs taxed after, the costs were considered as a part of the original debt, and the certificate was held to extend to both, because both were provable. This was an early case (*Lewis v. Piercy*, 1 H. Bl. 59). If the verdict, as well as the judgment, is after the bankruptcy, the costs are not provable (*Ex parte Pouchier*, 1 Glyn & J. 385).

The decisions in the courts of the several States are not altogether harmonious. The following cases hold that a judgment obtained between the time of filing the petition in bankruptcy and the granting of the discharge, is not barred by the discharge. *Bradford v. Rice*, 102 Mass. 472; *Woodbury v. Perkins*, 5 Cush. (Mass.) 86; *Ellis v. Ham*, 28 Me. 385; *Thompson v. Hewitt*, 6 Hill (N. Y.) 254; *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73; *Holbrook v. Foss*, 27 Me. 441; *Uran v. Hondlette*, 36 Me. 15; *Pike v. McDonald*, 32 Me. 418; *Fisher v. Foss*, 30 Me. 459; *Roden v. Jacob*, 17 Ala. 344; *Ingersoll v. Rhoades*, 1 Hill & D. (N. Y.) 371; *Rees v. Butler*, 18 Mo. 173; *Leavitt v. Baldwin*, 4 Edw. (N. Y.) 289.

On the other hand, the following authorities maintain that the discharge will bar the judgment; and the court will inquire to see whether the original debt be one that would be barred by the discharge. *Harrington v. McNaughton*, 20 Vt. 283; *Dresser v. Brooks*, 3 Barb. (N. Y.) 429 (denying certain *dicta* in earlier cases); *Johnson v. Fitzhugh*, 3 Barb. (N. Y.) Ch. 360; *Clark v. Rowling*, 3 N. Y. 216; *Fox v. Woodruff*, 9 Barb. (N. Y.) 498; *McDonald v. Ingraham*, 30 Miss. 389; *Downer v. Rowell*, 26 Vt. 397; *Dick v. Powell*, 2 Swan (Tenn.) 632; *Stratton v. Perry*, 2 Tenn. Ch. p. 635; *Eberhardt v. Wood*,

testifying in an action between two of his creditors, unless he will gain or lose by the decision.<sup>1</sup> Thus, where the result of the trial can only determine which creditor the witness shall pay, he is competent;<sup>2</sup> but the reverse is true, where, if the party calling him succeed, the witness's debt is paid, while if the other party prevail, his creditor remains unpaid, and the witness is left with a claim to the same amount against an insolvent man. In such a case his interest is not balanced.<sup>3</sup> So if he has no interest,<sup>4</sup> as is the case with one whose debt, without his request, has been assumed by a third person; he does not thereby become his debtor, and is consequently a competent witness for him, when sued on his promise, to prove the consideration on which it was founded.<sup>5</sup> So, also, a minor, whose purchase of goods defendant promises to pay, may be the creditor's witness as to the amount and value of the goods and the character of defendant's promise. His obligation to defendant is only an honorary one.<sup>6</sup> Again, a debtor is competent to prove his own fraud; as where he disposes of property in fraud of creditors, who sue to recover it;<sup>7</sup> and, conversely, if after such a fraudulent transaction he sells the property to a *bona fide* purchaser, he may give testimony to sustain such sale, on being released.<sup>8</sup> So, also, he may support the title of a *bona fide* assignee against the claim of another creditor who attaches the property assigned;<sup>9</sup> or against a person who wrongfully converts it.<sup>10</sup>

But where the debtor is interested, as in an attempt by the creditor to make the debt out of property claimed by a third person;<sup>11</sup> or where a sheriff being sued for the escape of the witness, he seeks to testify as to his inability to pay

Id. 490; Harris v. Vaughan, Id. 486; Lowry v. Hardwick, 4 Humph. (Tenn.) 188; Monroe v. Upton, 50 N. Y. 593. See Weeks v. Prescott, 54 Vt. 318.

<sup>1</sup> Updegraff v. Rowland, 52 Pa. St. 317; Ferree v. Thompson, Id. 353.

<sup>2</sup> Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25. And see Galway's Appeal, 34 Pa. St. 242.

<sup>3</sup> Danforth v. Roberts, 20 Me. 307.

<sup>4</sup> Gifford v. Coffin, 5 Pick. (Mass.) 447, where the debtor had paid money to plaintiff's attorney (the defendant), and was called to prove that he had paid it.

<sup>5</sup> Beall v. Ridgeway, 18 Ala. 117.

<sup>6</sup> Sanford v. Howard, 29 Ala. 684.

<sup>7</sup> Wisner v. Brady, 11 Iowa, 248.

S. P. Philbrook v. Handley, 27 Me. 53; Aiken v. Kilburne, Id. 252.

<sup>8</sup> Caston v. Ballard, 1 Hill (S. C.) 406. See Jackson v. Peek, 4 Wend. (N. Y.) 300.

<sup>9</sup> Prince v. Shepard, 9 Pick. (Mass.) 176.

<sup>10</sup> Etter v. Bailey, 8 Pa. St. 442.

<sup>11</sup> Paul v. Rogers, 5 T. B. Mon. (Ky.) 164.

the debt;<sup>1</sup> or where, the suit being against an administrator for money claimed to have been paid to him as such by the witness, his testimony is adduced to prove such payment;<sup>2</sup> in all such cases the debtor is an incompetent witness.

As respects *joint debtors*, it has been held that one of them, who is not sued, may testify for the plaintiff against the others.<sup>3</sup> So, also, after being discharged in bankruptcy, he may become a witness for his co-debtor in an action for the recovery of the joint debt.<sup>4</sup>

It has been repeatedly decided that an *execution debtor* is competent as a witness for the claimant of property taken on the execution.<sup>5</sup> So is he competent against the claimant.<sup>6</sup> And in an action against a sheriff for a false return,<sup>7</sup> or in a proceeding against a garnishee on the execution,<sup>8</sup> or in an action by the sheriff to recover from the purchaser on execution the amount of his bid,<sup>9</sup> the execution debtor is a competent witness for the plaintiff. On the other hand, in an action by the execution creditor against the sheriff, for not assigning the bail bond taken by him on mesne process;<sup>10</sup> or for neglecting to satisfy the execution upon goods which had been attached and receipted for at the beginning of the suit;<sup>11</sup> or for an escape on execution;<sup>12</sup> or in debt, for a false return,<sup>13</sup> the execution defendant may testify in favor of the officer. But in an action against the sheriff for wrongfully taking his goods on execution, he cannot be allowed to prove a sale of the goods by him to the plaintiff before the levy.<sup>14</sup>

<sup>1</sup> *Griffin v. Brown*, 2 Pick. (Mass.) 304.

<sup>2</sup> *Horine v. Horine*, 11 Me. 649.

<sup>3</sup> *Gay v. Cary*, 9 Cow. (N. Y.) 44; *Thornton v. Lane*, 11 Ga. 459.

<sup>4</sup> *Frentress v. Markle*, 2 Greene (Iowa) 553.

<sup>5</sup> *Clifton v. Bogardus*, 2 Ill. (1 Scam.) 32; *Holman v. Arnett*, 4 Port. (Ala.) 63; *Hankins v. Ingols*, 4 Blackf. (Ind.) 35; *Bradbury v. Dougherty*, 7 Id. 467; *Ewing v. Cargill*, 21 Miss. 79; *Clark v. Watson*, 50 Pa. St. 317. But see *Edwards v. Musgrove*, *Dudley* (Ga.) 219; *Williams v. Kelsey*, 6 Ga. 365.

<sup>6</sup> *Converse v. McKee*, 14 Tex. 20.

<sup>7</sup> *Taylor v. Commonwealth*, 3 Bibb (Ky.) 356.

<sup>8</sup> *Scales v. Southern Hotel Co.*, 37

Mo. 520. But see *Jones v. Bank of Northern Liberties*, 44 Pa. St. 253.

<sup>9</sup> *Yongue v. Aiken*, 3 Strobb. (S. C.) 533.

<sup>10</sup> *Newell v. Hoadley*, 8 Conn. 381.

<sup>11</sup> *Pillsbury v. Small*, 19 Me. 435.

<sup>12</sup> *Bond v. Brady*, 7 Blackf. (Ind.) 39; *Waters v. Burnet*, 14 Johns. (N. Y.) 362.

<sup>13</sup> *Limpus v. State*, 7 Blackf. (Ind.) 43. But see *Leiper v. Gewin*, 8 Ala. 326.

<sup>14</sup> *Burns v. Taylor*, 3 Port. (Ala.) 187. As to the competency of the debtor to testify as affected by his *insolvency*, see *Smith v. Vertress*, 2 Bush (Ky.) 63; *Bean v. Bean*, 12 Mass. 20; *Clark v. Gordon*, 13 Metc. (Mass.) 434; *Byrne v. Becker*, 42 Mo. 264; *Davis v. Cram*, 4 Sandf. (N. Y.) 355.

(2) *Creditor*. The general creditor of a plaintiff is not incompetent to testify for him, in the absence of some legal interest in a right to the fund to be recovered, merely because he expects to be paid out of that fund;<sup>1</sup> although he swears that his prospects of getting his debt will be increased by plaintiff's recovery,<sup>2</sup> and it appears that plaintiff has no means of paying unless he does recover.<sup>3</sup> But the fact that the witness is a creditor of the plaintiff, in such cases, may be shown as affecting his credibility.<sup>4</sup> So, also, he is often a competent witness, for his own protection, where no legal interest exists; as where a surety for the debt asks to be relieved, alleging a new agreement between the principal and the creditor;<sup>5</sup> or where he seeks to show the fraudulent character of a conveyance of his property executed by the debtor.<sup>6</sup>

A petitioning creditor *in bankruptcy* is a competent witness to prove his own debt in an action between other parties;<sup>7</sup> and it is no objection to his competency, that a recovery would tend to increase the fund out of which he is to be paid.<sup>8</sup> So, also, he may prove fraud in order to prevent the debtor's discharge under the *insolvent* laws,<sup>9</sup> or to impeach his discharge in *bankruptcy*;<sup>10</sup> but not, it would seem, in a suit to avoid an assignment for the benefit of creditors, one of whom he is.<sup>11</sup>

Where the indebtedness is that of the estate of a deceased person, the creditor is held incompetent even to show the dignity of his contract with the decedent, as affecting only the priority of his claim.<sup>12</sup> But he can prove his debt in support of the administrator's petition for leave to sell real estate for the payment of debts;<sup>13</sup> and after such a sale obtained at his own instance, he is competent for the purchaser, to prove that the debt to pay which the land was sold was a just debt.<sup>14</sup>

<sup>1</sup> *Warne v. Prentiss*, 9 Mo. 544.

<sup>2</sup> *Illinois Mut. Fire Ins. Co. v. Mar-*  
*seilles Manuf. Co.*, 6 Ill. 236.

<sup>3</sup> *Noyes v. Sturdivant*, 18 Me. 104.

<sup>4</sup> *McClure v. King*, 13 La. Ann. 141.

<sup>5</sup> *Bartlow v. Bond*, 3 Dana (Ky.)  
591.

<sup>6</sup> *Lillie v. Wilson*, 2 Root (Conn.)  
517.

<sup>7</sup> *Farrington v. Farrington*, 4 Mass.  
237. But see *Stone v. Stone*, 1 Ala.  
582.

<sup>8</sup> *Delaware &c. R. R. Co. v. Irick*, 3

*Zab.* (N. J.) 321. *Contra*, *Carr v. Hil-*  
*ton*, 1 Curt. (U. S.) 390.

<sup>9</sup> *Green's case*, 2 Dall. (U. S.) 268.

<sup>10</sup> *Cutler v. Taylor*, 1 Sandf. (N. Y.)  
593.

<sup>11</sup> *Jacks v. Nichols*, 3 Sandf. (N. Y.)  
Ch. 313. But see *Duel v. Fisher*, 4  
Den. (N. Y.) 515.

<sup>12</sup> *Latimer v. Sayre*, 45 Ga. 468.

<sup>13</sup> *Chamberlin v. Chamberlin*, 4 Allen  
(Mass.) 184.

<sup>14</sup> *Hudgin v. Hudgin*, 6 Gratt. (Va.)  
320.

So also, he may testify to increase the fund out of which his debt is to be paid, provided the estate be a solvent one;<sup>1</sup> but not so if the estate be insolvent.<sup>2</sup>

A *judgment creditor* of one presumably insolvent may testify for him in a suit for the recovery of land;<sup>3</sup> or for the administrator of his intestate debtor, who sues to recover a debt due the estate;<sup>4</sup> or in a proceeding to try the right of property levied on, if he has no direct interest;<sup>5</sup> or in an issue between two other judgment creditors to try the validity of a judgment in favor of one of them.<sup>6</sup> And where, after a sale on execution, a third person claims the property, the *execution creditor* may testify in support of the title of the execution debtor.<sup>7</sup>

§ 58. **Donor or Donee.**—The *donor* is a competent witness, at common law, in favor of the donee, or one holding under him, in a controversy involving the title to the gift.<sup>8</sup> He is competent, so far as interest is concerned, though the donee be his child, and the validity of the gift be attacked by the donor's creditors.<sup>9</sup>

In Massachusetts, it is held that the *donee* of a promissory note, given to him *causa mortis*, may testify in an action brought by him thereon in the name of the administrator of the donor.<sup>10</sup> But in New York, it was held, in chancery, that the donee of a gift *causa mortis*, who has received and distributed it to other participants, was not a competent witness, in behalf of himself or the others interested therein, to sustain it, in a suit by the executors of the donor against the recipients of the fund.<sup>11</sup>

§ 59. **Grantor or Grantee.**—(1) *Grantor.* As a general rule, a grantor of land, who has no interest in the suit, and

<sup>1</sup> Foster v. Wallace, 2 Mo. 231; Boyer v. Kendall, 14 S. & R. (Pa.) 178.

<sup>2</sup> Marre v. Ginocchio, 2 Bradf. (N. Y.) 165; Flinn v. Chase, 4 Den. (N. Y.) 85. Compare Moore v. Taylor, 44 N. H. 370. As to the competency of attaching creditors, see Jarboe v. Colvin, 4 Bush (Ky.) 70; Graves v. Blanchard, 4 How. (N. Y.) Pr. 300.

<sup>3</sup> Jones v. Brownfield, 2 Pa. St. 55.

<sup>4</sup> Nicholson v. Frazier, 4 Harr. (Del.) 206.

<sup>5</sup> Lothrop v. Wightman, 41 Pa. St. 297.

<sup>6</sup> Brown v. Parkinson, 56 Pa. St. 336. See also Seitzinger v. Ridgway, 4 Watts & S. (Pa.) 472; Guignard v. Aldrich, 10 Rich. (S. C.) Eq. 253.

<sup>7</sup> Rowe v. Cockrell, 1 Bail. (S. C.) Eq. 126.

<sup>8</sup> Humphries v. Dawson, 38 Ala. 199; Gunn v. Mason, 2 Sneed (Tenn.) 637.

<sup>9</sup> Easley v. Dye, 14 Ala. 158. S. P. Moore v. M'Kie, 13 Miss. 238.

<sup>10</sup> Bates v. Kempton, 7 Gray (Mass.) 382.

<sup>11</sup> Thorp v. Amos, 1 Sandf. (N. Y.) Ch. 26.

who has made no covenants, is a competent witness,<sup>1</sup> for merely being in a chain of title will not disqualify a witness.<sup>2</sup> The *title* to the premises in question not being in issue, it is no objection to the witness that he is the grantor of the party calling him.<sup>3</sup> The deed not being in evidence, the grantor is presumed competent to testify concerning it, and the burden of proof of his interest is on the party objecting to him as a witness.<sup>4</sup> Thus, he may testify in support of the title derived under the deed,<sup>5</sup> where a third person seeks to eject his grantee;<sup>6</sup> and where both parties claim the land under the same title, the original grantor may testify for either.<sup>7</sup> He may prove the execution of the deed,<sup>8</sup> and is competent for that purpose even though he asserts that the instrument is invalid.<sup>9</sup> He may testify as to the situation of the premises at the time of the grant;<sup>10</sup> and explain the character of a possession adverse to his, at a given time;<sup>11</sup> but in Missouri he cannot be a witness to change, alter, or qualify the effect or operation of his conveyance.<sup>12</sup>

Where the validity of the conveyance is attacked, the grantor, if without interest, is a competent witness to impeach it.<sup>13</sup> Thus, in such a case, he may testify that the deed was obtained by fraud;<sup>14</sup> or that no consideration passed.<sup>15</sup> He is competent either to prove or disprove the fraud — the objection goes to his credit, not to his competency.<sup>16</sup>

A grantor by deed of *general warranty* is a competent

<sup>1</sup> *Herbert v. Herbert*, 1 Ill. 278.

<sup>2</sup> *Myers v. Brownell*, 1 D. Chip. (Vt.) 455.

<sup>3</sup> *Hull v. Fuller*, 7 Vt. 106.

<sup>4</sup> *Wright v. Carillo*, 22 Cal. 595.

<sup>5</sup> *Gratz v. Ewalt*, 2 Binn. (Pa.) 95; *Cain v. Henderson*, Id. 108.

<sup>6</sup> *Doe v. Jackson*, 10 Miss. 494. S. P. *Hall v. Gittings*, 2 Har. & J. (Md.) 380.

<sup>7</sup> *Roberts v. Whiting*, 16 Mass. 186; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253.

<sup>8</sup> *Smith v. Morrow*, 7 J. J. Marsh. (Ky.) 442.

<sup>9</sup> *Swift v. Fitzhugh*, 9 Port. (Ala.) 39.

<sup>10</sup> *Baker v. Sanderson*, 3 Pick. (Mass.) 348.

<sup>11</sup> *Nichols v. Hotchkiss*, 2 Day (Conn.) 121.

<sup>12</sup> *Bruce v. Simms*, 34 Mo. 246.

<sup>13</sup> *Norton v. Linton*, 18 Ala. 690; *Sims v. Killen*, 12 Ala. 497; *Hudson v. Hulbert*, 15 Pick. (Mass.) 423; *Hadduck v. Wilmarth*, 5 N. H. 181; *Simmons v. Parsons*, 1 Bailey (S. C.) 62.

<sup>14</sup> *Lloyd v. Higbee*, 25 Ill. 603; *Gage v. Gage*, 25 Ill. 603.

<sup>15</sup> *Reeves v. Shry*, 39 Tex. 634. To the contrary, see *Jackson v. Leek*, 19 Wend. (N. Y.) 339, where, however, he was permitted to prove that the deed was forged.

<sup>16</sup> *Jackson v. Frost*, 6 Johns. (N. Y.) 135. But see *Strike v. McDonald*, 2 Har. & G. (Md.) 191. As to his competency as a witness to show a trust, or to prove that the deed was intended to operate as a mortgage, see *Barrett v. Carter*, 3 Lans. (N. Y.) 68; *Kronk v. Kronk*, 4 Watts & S. (Pa.) 127; *Gillespie v. Miller*, 37 Pa. St. 247.

witness in an action involving the title to the land, between his grantee and an execution creditor of the grantor.<sup>1</sup> He is a good witness provided the title set up by the adverse party be not in conflict with that which he has conveyed and is called to sustain.<sup>2</sup> So, where he warrants the title against all persons claiming under him, he may testify in his grantee's action against one who does not so claim, as he cannot, in such case, be interested in the event.<sup>3</sup> Such grantor is also competent to testify *against* his grantee, where the latter is charged by a third person with trespass;<sup>4</sup> or, to show that he had conveyed, by mistake, a greater interest in the land than he possessed;<sup>5</sup> in such cases he testifies against interest, his safety lying in the validity of his conveyance. Such is the case also, where he is called to testify in favor of one to whom he has quit-claimed, and against his grantee of the same land with warranty.<sup>6</sup> But in many cases it is held that he cannot testify in support of the title he has conveyed, until he has been released from the obligation of his covenant.<sup>7</sup>

(2) *Grantee.* The grantee is a competent witness at common law, to prove that the deed was delivered to a third person on a condition to be performed, and that it had never been delivered to him.<sup>8</sup> So also, he may prove that the deed was made to defraud creditors;<sup>9</sup> and he is also a competent

<sup>1</sup> Blaisdell v. Cowell, 14 Me. 370.

<sup>2</sup> Prescott v. Hawkins, 22 N. H. 191; Harris v. Fletcher, 10 Id. 20; Goodman v. Losey, 3 Watts & S. (Pa.) 526.

<sup>3</sup> Twambly v. Henley, 4 Mass. 441; M'Clain v. Gregg, 2 A. K. Marsh. (Ky.) 454; Sweetzer v. Meece, 6 Binn. (Pa.) 500; Beach v. Sutton, 5 Vt. 209. See also Beers v. Broome, 4 Conn. 247; Robertson v. Mosson, 26 Tex. 248.

<sup>4</sup> Van Nuys v. Terhune, 3 Johns. (N. Y.) Cas. 82.

<sup>5</sup> Stewart v. Chadwick, 8 Iowa, 463. But see Erb v. Underwood, 3 Yeates (Pa.) 172.

<sup>6</sup> Wise v. Tripp, 13 Me. 9. Otherwise, where both conveyances are with warranty, Jackson v. Hallenback, 2 Johns. (N. Y.) 394.

<sup>7</sup> Lester v. White, 44 Ill. 464; Hamilton v. Doolittle, 37 Ill. 473; Wall v. Nelson, 3 Litt. (Ky.) 395; Field v.

Snell, 4 Cush. (Mass.) 504; Cooper v. Granberry, 33 Miss. 117; Dayton v. Newman, 19 Pa. St. 194; Ellis v. Ponton, 32 Tex. 434. See also Jackson v. Root, 18 Johns. (N. Y.) 60; Kendall v. Field, 14 Me. 30. As to the competency of grantors by quit-claim deed, see Taylor v. Luther, 2 Sumn. (U. S.) 228; Flogg v. Mann, Id. 486; Lay v. Hayden, 2 Root (Conn.) 317; Kline v. Beebe, 6 Conn. 494; Rogers v. Turley, 4 Bibb (Ky.) 355; Jackson v. Hubble, 1 Cow. (N. Y.) 613. Of grantors by deed of trust, see Stewart v. Fowler, 3 Ala. 629; Hodge v. Thompson, 9 Ala. 131; Frow v. Downman, 11 Ala. 880; Kirksey v. Dubose, 19 Ala. 43; Dameron v. Williams, 7 Mo. 138; Keiser v. Moore, 14 Mo. 28.

<sup>8</sup> Jackson v. Sheldon, 22 Me. 569.

<sup>9</sup> Croft v. Arthur, 3 Dessau. (S. C.) 223; Hancock v. Horan, 15 Tex. 507.



witness for the defendant (grantor) in such a case, if it is not shown that he participated in such fraudulent purpose, or was cognizant thereof, nor that the property, or the money received on the sale thereof, is still in his hands.<sup>1</sup> And one of two grantees claiming under the same deed, or covenant, may generally testify for the other, suing or defending in respect of the land.<sup>2</sup> But if the grantee be interested in the event, he is incompetent: this is the case where a trustee has an interest under a trust deed both for himself and for creditors;<sup>3</sup> or where the land was subject to attachment at the time of the grant, and the attachment is sought to be enforced subsequently.<sup>4</sup>

§ 60. **Guardian or Ward.**—(1) *Guardian.* At common law a guardian of an infant was not deemed a competent witness, generally, in his own behalf, on the final settlement of his accounts.<sup>5</sup> And his incompetency extended to actions in which the ward was a party plaintiff or defendant;<sup>6</sup> and to actions by the guardian, in his own name, to enforce contracts made by him for the ward's benefit.<sup>7</sup> So, also, a guardian *ad litem* or next friend of an infant plaintiff was deemed incompetent for the plaintiff whom he represented.<sup>8</sup>

But this rule was not without exceptions: thus the guardian of an infant testatrix was admitted to prove her competency to make a will;<sup>9</sup> so was a guardian who sued for damages for the abduction of the ward, to whose benefit the recovery would inure;<sup>10</sup> and a former guardian, who had fraudulently released a mortgage belonging to the ward, was permitted, in an action by his successor to annul such

<sup>1</sup> Johnson v. Johnson, 3 Metc. (Mass.) 63.

<sup>2</sup> Ford v. Bronaugh, 11 B. Mon. (Ky.) 14; Cheswell v. Eastham, 16 N. H. 296.

<sup>3</sup> Selser v. Ferriday, 21 Miss. 698.

<sup>4</sup> Beach v. Packard, 10 Vt. 96; Schillinger v. McCann, 6 Me. 364. See also Leib v. Childs, 3 Pa. L. J. Rep. 70, where the land was conveyed subject to ground rent, the recovery of arrearages of which was the object of the suit.

<sup>5</sup> Padgett v. Padgett, 41 Ala. 382; but he was made competent in Alabama by the act of Feb. 14, 1867; Ala. Rev. Code, § 2704; Brand v. Ab-

bott, 42 Ala. 499; Bogia v. Darden, 45 Ala. 269.

<sup>6</sup> Stein v. Robertson, 30 Ala. 286; Hungerford v. Bourne, 3 Gill & J. (Md.) 133. *Contra*, Todd v. Dysart, 23 Tex. 590.

<sup>7</sup> Murphy v. Hubble, 2 Duv. (Ky.) 247.

<sup>8</sup> Pryor v. Ryburn, 16 Ark. 671; Hahn v. Van Doren, 1 E. D. Smith (N.Y.) 411. *Contra*, Murphy v. Murphy, 24 Mo. 526; McCullough v. McCullough, 31 Id. 226.

<sup>9</sup> Howard v. Coke, 7 B. Mon. (Ky.) 655.

<sup>10</sup> Brown v. Crockett, 8 L. Ann. 30.

release, to testify that his admission, though in an authentic act, that the ward's claim had been paid, was untrue.<sup>1</sup> Of course, a guardian or *prochien ami*, like any other interested witness, could, in a proper case, be released for the purpose of using him as a witness.<sup>2</sup> And even if incompetent for his ward, yet where his testimony was addressed to the court, and was adverse to the ward's interest, it was held that the validity of the decree in the cause would not be affected by its admission.<sup>3</sup>

(2) *Ward*. In South Carolina, it was held that in an action on an administrator's bond, the plaintiff, a minor, and his guardian were incompetent to testify as to the value of the distributive share of the deceased's estate claimed.<sup>4</sup> But in Missouri it was decided that in a suit by a guardian to recover money of an intestate estate, in the hands of an administrator, the wards were competent to show his indebtedness to their guardian, as they had no right to the particular sum due, as their own absolute property.<sup>5</sup>

§ 61. **Heirs, Devisees, Legatees, and Next of Kin.**—(1) *Heirs*. The general rule was that the heirs of a deceased person could not testify in a suit in which the estate of the decedent was interested, unless it was shown affirmatively that they had no interest in the event of the suit.<sup>6</sup> Thus, in an action by an executor, the heir was not allowed to be a witness for the plaintiff;<sup>7</sup> and the rule was adhered to even where the proposed witness released his share in the debt sued for, his liability for costs still remaining undischarged.<sup>8</sup> He was held incompetent in such a case, although he stated, on his *voir dire*, that he had received the full amount of his distributive share, for which he gave his receipt to the administrator, the receipt not being produced;<sup>9</sup> but he was competent for the defendant, and being called by him, could

<sup>1</sup> Kemp v. Bowley, 2 La. Ann. 316. See also Waddel v. Moore, 2 Ired. (N. C.) L. 261; Givens v. Davenport, 8 Tex. 451.

<sup>2</sup> Harvey v. Coffin, 5 Blackf. (Ind.) 566.

<sup>3</sup> Quinn v. Moss, 12 Sm. & M. (Miss.) 365.

<sup>4</sup> Ordinary v. Bracey, 2 Bay (S. C.) 542.

<sup>5</sup> Bowman v. Stiles, 34 Mo. 141.

<sup>6</sup> Fagin v. Cooley, 17 Ohio, 44.

<sup>7</sup> White v. Derby, 1 Mass. 239; Sawyer v. Tappan, 14 N. H. 352. To the contrary, Gunnison v. Lane, 45 Me. 165; Butt v. Butt, 1 Ohio St. 222.

<sup>8</sup> Baxter v. Buck, 10 Vt. 548. See also Abercrombie v. Hall, 6 Ala. 657; Cox v. Wilson, 2 Ired. (N. C.) L. 234.

<sup>9</sup> Brown v. Hicks, 1 Ark. 232.

be cross-examined by the plaintiff as to all matters pertinent to the issue.<sup>1</sup>

In applying these principles, the common-law courts held that the heirs of a deceased mortgagor were incompetent to prove that an assignment by the deceased was without consideration, and void; for they were directly interested in the matter, as their title as heirs would be established by setting aside the assignment;<sup>2</sup> and on the trial of a suit between one of the heirs and a devisee under the will, the remaining heirs were held incompetent to testify against the devisee, although, prior to the institution of the suit, they had conveyed their interest in the subject-matter to the sole party of record.<sup>3</sup> In Louisiana, it is held that descendants cannot testify in civil cases for or against their ascendants.<sup>4</sup>

Upon the question of the probate of the will, the heirs were held competent;<sup>5</sup> and so were they in a proceeding to try the validity of a will giving the widow a larger share of the estate than the statute of distribution would have given her;<sup>6</sup> and also on appeal from an allowance of probate.<sup>7</sup>

So, also, in ejectment, one of several heirs in whose name a demise had been laid, but which had been stricken out of the declaration, was admitted to testify for the plaintiff;<sup>8</sup> and one of two co-heirs who had covenanted in a deed of partition that each should hold his own portion of the land free from all claim of the other, was held competent for the other heir in an action between the latter and a third person.<sup>9</sup> In several cases it is held that an heir at law who has received his portion, and executed a release of his interest,<sup>10</sup> or who has transferred his entire interest in the estate to a third person,<sup>11</sup> may testify in favor of the estate.

(2) *Devisees.* A devisee under a prior will, which might take effect in case of the setting aside of a subsequent will,

<sup>1</sup> *Cox v. Wilson, supra.*

<sup>2</sup> *Randall v. Phillips*, 3 Mason (U. S.) 378.

<sup>3</sup> *Asay v. Hoover*, 5 Pa. St. 21.

<sup>4</sup> *Succession of Weigel*, 18 La. Ann. 49.

<sup>5</sup> *Nash v. Reed*, 46 Me. 168; Me. Rev. Stat. 1857, ch. 82, § 83.

<sup>6</sup> *Roberts v. Trawick*, 17 Ala. 55.  
In this case the witnesses were the heirs of the widow, she being deceased,

and they were admitted to testify against the will only, not to sustain it.

<sup>7</sup> *Wheeler v. Towns*, 43 N. H. 56.

<sup>8</sup> *Cardwell v. Sprigg*, 1 B. Mon. (Ky.) 369.

<sup>9</sup> *Morris v. Harris*, 9 Gill (Md.) 19; *Harris v. Morris*, 4 Md. Ch. 529.

<sup>10</sup> *Spann v. Ballard*, 1 Rice (S. C.) 440.

<sup>11</sup> *Sylvester v. Downer*, 20 Vt. 355; *Reed v. Gilbert*, 32 Me. 519.

is incompetent as a witness against the latter;<sup>1</sup> so, if his share in the estate under the statute of distribution, or as heir at law, would be greater than the share devised to him, he cannot, at common law, testify against the will;<sup>2</sup> and he is incompetent to testify for the executor in an action against the latter to charge the lands devised; and this even though he has released his interest under the will.<sup>3</sup> But it was held in an early case in New York, that in ejectment against a devisee, a co-devisee, and tenant in common with the defendant, not in actual possession, and who, on his *voir dire*, stated that he did not know that he was interested, might be a witness for the defendant.<sup>4</sup> And the better opinion seems to be that even at common law, the mere fact that the witness will take a devise or legacy under a will does not render him incompetent to testify in proceedings to establish or prove the will.<sup>5</sup>

(3) *Distributees.* *Prima facie* a distributee is incompetent at common law where his testimony will tend to increase the funds of the estate;<sup>6</sup> or where his distributive share will be affected by the event of the suit.<sup>7</sup> But if the distributee has received a portion of his share, or sold or assigned it to another, he may become a competent witness, by releasing all his interest in the estate to the administrator.<sup>8</sup> And cases are not lacking which hold the distributee competent even without a release of interest.<sup>9</sup>

<sup>1</sup> Hall v. Hall, 17 Pick. (Mass.) 373.

<sup>2</sup> Canfield v. Ball, 4 Halst. (N. J.) Eq. 582.

<sup>3</sup> Norris v. Johnston, 5 Pa. St. 287.

<sup>4</sup> Jackson v. Nelson, 6 Cow. (N. Y.) 248.

<sup>5</sup> Gamache v. Gambs, 52 Mo. 287. *Contra*, Lee v. Dill, 39 Barb. (N. Y.) 516. And see Winant v. Winant, 1 Murph. (N. C.) 148, where one to whom the testator devised permission "to live six months in his house if she chooses" was admitted to prove the will as to real estate.

<sup>6</sup> McGuire v. Shelby, 20 Ala. 456; Anderson v. Primrose, Dud. (Ga.) 216; Denny v. Booker, 2 Bibb (Ky.) 427; Cox v. McKean, 56 Pa. St. 243; Smith v. Morgan, 8 Gill (Md.) 133; Dillard v. Wright, 11 Sm. & M. (Miss.) 455; *Contra*, Stein v. Weidman, 20 Mo. 17; Perry v. Maguire, 31 Mo. 287; Stewart

v. Spedden, 5 Md. 433. And see Penn v. Watson, 20 Mo. 13.

<sup>7</sup> Foster v. Nowlin, 4 Mo. 18; Carter v. Graves, 7 Miss. 9; Spears v. Burton, 31 Miss. 547. See also Lemore v. Nuckolls, 37 Ala. 662; s. c., 1 Ala. Sel. Cas. 591; Kirksey v. Kirksey, 41 Ala. 626.

<sup>8</sup> Hall v. Alexander, 9 Ala. 219; Dent v. Portwood, 17 Ala. 242; Herndon v. Givens, 19 Ala. 313; Coate v. Coate, 37 Ala. 695; s. c., 1 Ala. Sel. Cas. 627; Boon v. Nelson, 2 Dana (Ky.) 391; Boynton v. Turner, 13 Mass. 361. But see to the contrary Smith v. Morgan, 8 Gill (Md.) 133; King v. King, 1 Stock. (N. J.) 44.

<sup>9</sup> See Broadhead v. Jones, 39 Ala. 96; Shine v. Redwine, 30 Ga. 780; Swofford v. Gray, 8 Ind. 508; Jones v. Jones, 36 Md. 447; Richmond v. Cross, 13 Mo. 75.

(4) *Legatees*. The same rule applies to legatees, that is to say, they are *prima facie* deemed incompetent to testify in favor of the fund out of which their legacies are to be derived, either to increase or prevent diminution of the fund.<sup>1</sup> Thus it has been repeatedly held that a legatee is not a competent witness for the executor, so long as his legacy is subject to abatement.<sup>2</sup> Nor is he competent to testify against the will where it is for his interest to defeat it;<sup>3</sup> but the mere fact that the will gives him a legacy does not render him incompetent to testify against the validity of the will;<sup>4</sup> or to establish a will which he himself destroyed.<sup>5</sup>

Where the legacy has been paid,<sup>6</sup> or the legatee has released his interest,<sup>7</sup> he becomes competent notwithstanding his remote liability to creditors, or for the costs of the suit in which he is called as a witness.<sup>8</sup>

<sup>1</sup> Robertson v. Allen, 16 Ala. 106; Master v. Zimmerman, 7 Ill. App. 156.

In trover by the executor for a conversion of goods since testator's decease, a legatee may testify, the event of the suit having no tendency to increase or diminish the assets. Carlisle v. Burley, 3 Me. 250. So he may support the will, where his interest is adverse to that of the party calling him. Clark v. Vorce, 19 Wend. (N. Y.) 232. S. P. Nunn v. Owens, 2 Strobb. (S. C.) 101. And a specific legatee who can have no interest in the residuum is a competent witness to prove the delivery of goods, unless there is a reasonable probability that his legacy must be resorted to for the payment of debts. Learey v. Littlejohn, 1 Murph. (N. C.) 406. In Levers v. Van Buskirk, 4 Pa. St. 309, a legatee in a will more than 20 years old, which charged his legacy on the land, was held a competent witness for the devisees; it appearing that there was other property, and no evidence that he could be called upon to refund; and in Tucker v. Whitehead, 59 Miss. 594 (a recent case) the principal legatee was allowed to testify upon an issue *devisavit vel non*.

<sup>2</sup> Strong v. Finch, Minor (Ala.) 256. La Rue v. Boughaner, 1 South. (N. J.)

104; Hedges v. Boyle, 2 Halst. (N. J.) 68; Campbell v. Tousey, 7 Cow. (N. Y.) 64; Temple v. Ellett, 2 Munf. (Va.) 452.

<sup>3</sup> Roberts v. Trawick, 13 Ala. 68.

<sup>4</sup> Leslie v. Sims, 39 Ala. 161; Landis v. Landis, 1 Grant (Pa.) Cas. 248.

<sup>5</sup> Wyckoff v. Wyckoff, 1 C. E. Gr. (N. J.) 401.

<sup>6</sup> Wilcocks v. Phillips, Wall., Jr. 47; Clealand v. Huey, 18 Ala. 343; Johnson v. Lewis, 8 Ga. 460; Mesick v. Mesick, 7 Barb. (N. Y.) 120; Cornell v. Vanartsdalen, 4 Pa. St. 364.

<sup>7</sup> Martin v. Mitchell, 28 Ga. 382; Higgins v. Morrison, 4 Dana (Ky.) 100; Whelpley v. Loder, 1 Demarest (N. Y.) 368; Steining v. Hoch, 42 Pa. St. 432.

<sup>8</sup> In an early Connecticut case it is held that a residuary legatee cannot be admitted as a witness to increase the fund on which the residuum depends, and a release by him of a particular thing appertaining to this fund, which may be the subject of the suit on trial, does not discharge his interest. Austin v. Bradley, 2 Day (Conn.) 406. But an assignment of his whole interest in the estate will make him competent. Freeman v. Spalding, 12 N. Y. 373. See Chap. VII., *infra*.

§ 62. **Jurors.** — (1) *Grand Jurors.* The principle upon which jurors, grand and traverse, are excluded from the witness-box would rather seem to rest upon grounds of public policy, than upon the fact of interest on the part of the witness, or upon the fact that he is sworn to secrecy.<sup>1</sup> Under the English practice a grand juror may be questioned as to matters laid before the grand jury in the course of a criminal proceeding. Thus in an action for malicious prosecution, where the question was whether the defendant was the prosecutor, Lord Kenyon allowed the plaintiff's counsel to prove the affirmative by the oath of a grand juror.<sup>2</sup> But the King's Bench refused a grand juror's evidence as to the number of grand jurors who concurred in finding an indictment;<sup>3</sup> or to explain whether certain words were intentionally or accidentally blotted out in the indictment.<sup>4</sup> If one of the grand jurors has any particular knowledge on the subject under investigation, arising from his being in a certain trade or otherwise, he may be sworn and examined as a witness.<sup>5</sup>

Under the English law it seems to be doubtful whether a grand juror may testify as to what a witness said before the grand jury,<sup>6</sup> but his competency to do this seems to be settled in several of the States.<sup>7</sup>

<sup>1</sup> See remarks of Lord Ellenborough in *Watson's case*, 32 How. St. Tr. 107. And see *Fenwick's case*, 5 Harg. St. Tr. 72; also 12 Vin. Abr. Ev. 5, where a case is cited in which the evidence of the clerk of the grand jury was rejected.

<sup>2</sup> *Sykes v. Dunbar*, 2 Selw. N. P. (Whcat.) 815; *followed Freeman v. Arkell*, 1 Car. & P. 137. See also to same effect *Sands v. Robison*, 20 Miss. 704; *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21; *People v. Young*, 31 Cal. 564; *White v. Fox*, 1 Bibb (Ky.) 369; *Rocco v. State*, 37 Miss. 357; *State v. McDonald*, 73 N. C. 346. So also he may prove that a certain person did not testify before the grand jury. *Commonwealth v. Hill*, 11 Cush. (Mass.) 137.

<sup>3</sup> *R. v. Marsh*, 6 Ad. and E. 236; *Sykes v. Dunbar*, 2 Selw. N. P. 815 [1059]. It is held in Maine and Massachusetts that he may testify as to

whether twelve of the grand jury concurred in the finding, the certificate of the foreman not being conclusive evidence of that fact. *Low's case*, 4 Me. 439; *McLellan v. Richardson*, 1 Shep. (Me.) 82; *Commonwealth v. Smith*, 9 Mass. 107.

<sup>4</sup> *R. v. Cooke*, 8 Car. & P. 584. And see also Vin. Abr. Ev. H.; 4 Bl. Com. 126, and note by Mr. Christian.

<sup>5</sup> *R. v. Rosser*, 7 Car. & P. 648. See also *Manley v. Shaw*, C. & Marsh, 361; 1 Phill. Ev. (4 Am. Ed.) 15.

<sup>6</sup> 12 Vin. Abr. 20, Ev. H.; *Clayt.* 84, pl. 140.

<sup>7</sup> Thus a grand juror may be called to show that a witness who has just testified on the trial swore differently before the grand jury. *State v. Benner*, 64 Me. 267; *Canton v. State*, 13 Tex. App. 139; *overruling Ruby v. State*, 9 Id. 353; *Gordon v. Commonwealth*, 92 Pa. St. 216; s. c., 37 Am. Rep. 672; 1 Crim. L. Mag. 583. In

(2) *Petit Jurors.* At common law, petit or traverse jurors were not permitted to disclose, upon the witness-stand, the proceedings incident to their retirement and arrival at a verdict; or to prove misbehavior of any of their number in regard to the verdict. The rule was not only founded upon grounds of general public policy, but was intended to protect parties against fraud. The early English practice of admit-

the case last cited, which was decided by the Supreme Court of Pennsylvania in January, 1880, the foreman of the grand jury was called to prove that a certain question was put to the prosecuting witness, which she answered, but which question, she swore at the trial, was not put to her when in attendance upon the grand jury. The court say: "If the witness be incompetent for the purpose stated, it must be by reason of public policy. . . . As the rule was held at an early day he would be incompetent. For a long time, however, the courts have gradually been modifying its strictness and manifesting a determination to distinguish between the character of the evidence offered. The juror may be a competent witness for some purposes and not for others. Thus in *Sykes v. Dunbar*, 2 Wheat. Selw. N. P. 1091, one of the grand jury by whom a true bill had been found, was held competent to testify as to who was the prosecutor, although it was contended he could know the fact only from the testimony which had been produced before him in his character as a grand juror, and which, it was claimed, he was bound not to disclose. This case was cited with approbation in *Huidekoper v. Cotton*, 3 Watts (Pa.) 56, and the competency of a grand juror to testify as to who was the prosecutor, affirmed . . . the oath and the whole proceeding before a grand jury was not intended to protect the innocent witnesses and juror, but to punish the guilty party. It should not be so construed as to punish the innocent or obstruct the due course of justice. . . . It must be conceded that the rule shall not be carried so far as to conflict with the juror's oath. He shall not testify how he or any member of the jury

voted, nor what opinion any of them expressed in relation thereto, nor to the act of either, which might invalidate the finding of the jury. His action, and the action of his fellow-jurors, must be shown only by the returns which they make to the court. What a witness has testified to before them is quite another matter. A witness may be indicted for perjury, for false swearing before a grand jury, and grand jurors are competent witnesses to prove what he swore to before them (1 Whart. Cr. L. § 508). It is said in 1 Whart. Law of Ev. § 601, 'It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury-room; but it is now held that such evidence, whenever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required.' This conclusion appears to be sustained by numerous authorities, among which may be cited *Thomas v. Commonwealth*, 2 Rob. (Va.) 795; *State v. Offnutt*, 4 Blackf. (Ind.) 355; *State v. Fassett*, 16 Conn. 457; *Commonwealth v. Hill*, 11 Cush. (Mass.) 137; *State v. Broughton*, 7 Ired. (N. C.) L. 96; *Commonwealth v. Mead*, 12 Gray (Mass.) 167; *Way v. Butterworth*, 106 Mass. 75. The case of *Commonwealth v. Mead*, *supra*, rules the precise case we have before us. It was an indictment for manslaughter. To contradict a witness who testified in behalf of the Commonwealth, on the trial, the defendant offered to prove by the grand jurors who found the indictment, that he testified differently before them. The court below excluded the witnesses on the ground that it was against public policy and

ting jurors' affidavits to impeach their verdicts was broken in upon by Lord Mansfield, since whose time the English law excludes them.<sup>1</sup> The true rule seems to be that the testimony of a juror is admissible as to facts touching his own conduct or acts when separated from his fellows, or the acts and declarations of other persons with or to him, but inadmissible as to what transpired in the jury-room, while the jury were acting as such, presided over by their foreman and performing their official duty.<sup>2</sup> A juror may also testify to facts which came to his knowledge from his own personal observation, and not from what he has heard other witnesses swear to;<sup>3</sup> but he should not attempt to give his opinion on the merits of the matter in controversy.<sup>4</sup> He may show the identity of the subject-matter in different actions;<sup>5</sup> or what claims were allowed by the jury on a plea of payment;<sup>6</sup> but not that the damages were doubled in the verdict, even in an action brought to recover double damages under a statute;<sup>7</sup> and he cannot give evidence to his fellow-jurors without being sworn as an ordinary witness.<sup>8</sup>

established practice, to permit grand jurors to detail the evidence given before them for the purpose of impeaching the witness on the trial of the indictment. On exceptions taken, the case was reversed, the court holding that when the case was reached for trial, all useful purposes of secrecy had been accomplished. The necessity and expediency of retaining the seal of secrecy were at an end, and the jurors were held competent for the purpose of proving the facts." The contrary doctrine is held in *Imlay v. Rogers*, 2 Halst. (N. J.) 347; *Tindle v. Nichols*, 20 Mo. 326; and in *Beam v. Sink*, 27 Mo. 261, a grand juror was not allowed to testify that he was a member of the grand jury that indicted the plaintiff. That the American cases are in favor of allowing a grand juror to testify as to what any witness testified to before the grand jury, see *Shattuck v. State*, 11 Ind. 473; *Burdick v. Hunt*, 43 Id. 381; *Commonwealth v. Mead*, 12 Gray (Mass.) 166; *State v. Wood*, 53 N. H. 484; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181. See also as to the grand juror's privilege, *infra*, § 277.

<sup>1</sup> *Vaise v. Delavel*, 1 T. R. 11; *Jackson v. Williamson*, 2 Id. 281; *Owen v. Warburton*, 1 N. R. 326. S. P. *Little v. Larrabee*, 2 Me. 37, 41, *n.*, citing many cases; *State v. Freeman*, 5 Conn. 348; *Mead v. Smith*, 16 Id. 346; *Vance v. Haslett*, 4 Bibb (Ky.) 191.

<sup>2</sup> *Heffron v. Gallupe*, 55 Me. 563; *Studley v. Hall*, 22 Me. 198; *Hewett v. Chapman*, 49 Mich. 4.

<sup>3</sup> *State v. Powell*, 2 Halst. (N. J.) 244; *McKain v. Love*, 2 Hill (S. C.) 506.

<sup>4</sup> *Dunbar v. Parks*, 2 Tyler (Vt.) 217.

<sup>5</sup> *Stapleton v. King*, 40 Iowa, 278.

<sup>6</sup> *Piatt v. St. Clair*, 6 Ohio, 227; *Wright*, 261.

<sup>7</sup> *Hannum v. Belchertown*, 19 Pick. (Mass.) 311. See also *Howser v. Commonwealth*, 51 Pa. St. 332.

<sup>8</sup> *Anderson v. Barnes, Coxe* (N. J.) 203.

A juror's testimony or affidavit has been admitted to impeach the verdict in the following cases: *Anschicko v. State*, 6 Tex. App. 524; *Hunter v. State*, 8 Id. 75; *Nile v. State*, 11 Lea (Tenn.) 694; (but see *Cartwright v. State*, 12 Id. 620). See also *Tenny v. Evans*, 13 N. H. 462; *State v. Ayer*,



§ 63. **Landlord or Tenant.** — (1) *Landlord.* It is a rule of general application that one who has signed a lease, whether as lessor or lessee, is not a competent witness to impeach it;<sup>1</sup> but he may be to uphold it, or to protect his own or the other party's rights thereunder. Thus it is held that the lessor of the plaintiff in trespass is a competent witness for him, unless the lease binds him to protect the tenant from trespasses.<sup>2</sup> But he was held not a competent witness to prove his title, in order to enable his tenant to recover on his own demise, in an action of trespass;<sup>3</sup> nor is he competent for the lessee in an action for obstructing him in using a right of way to repair a dam, part of the demised premises.<sup>4</sup> One of several joint lessors entitled severally to a specified part of the rent is a competent witness for another of them in his action to recover his part of the rent.<sup>5</sup> In an early New York case it is held that the lessor of the plaintiff in ejectment cannot be a witness in the cause.<sup>6</sup>

(2) *Tenant.* We do not propose to consider in this connection the decisions upon the principle in the law of estoppel which prevents a tenant from disputing his landlord's title. So far as *interest* is concerned, it has been held that the tenant is a competent witness to dispute such title.<sup>7</sup> Our purpose is to examine the cases which pass upon his competency for or against the landlord or his co-tenant, in controversies between the latter and third persons, not directly involving the relation of landlord and tenant. If

23 N. H. 301; *Dana v. Tucker*, 4 Johns. (N. Y.) 487.

That such affidavit or testimony should not be received for such purpose, see *United States v. Clements*, 3 Hughes, 509; *State v. McConkey*, 49 Iowa, 499; *State v. Shock*, 68 Mo. 552; *State v. Wallman*, 31 La. Ann. 146; *People v. Sprague*, 53 Cal. 491; *State v. Mims*, 26 Minn. 183; s. c., 2 N. W. Rep. 683; *People v. Gray*, 9 Pac. C. L. J. 778; *Ostrander v. People*, 28 Hun (N. Y.) 38; *People v. Carnell*, 2 Edm. (N. Y.) Sel. Cas. 202; *Montgomery v. State*, 13 Tex. App. 75; *State v. Brittain*, 89 N. C. 481; *State v. Fox*, 79 Mo. 109.

That such affidavit is admissible to support the verdict, see *People v. Hunt*, 59 Cal. 430; s. c., 8 Pac. C. L. J.

590; *State v. Cartright*, 20 W. Va. 32; *State v. Robinson*, Id. 713; *Jones v. State*, 89 Ind. 82; *Cook v. Territory*, 4 West Coast Rep. 340.

<sup>1</sup> *Allen v. Holkins*, 1 Day (Conn.) 17.

<sup>2</sup> *McCormick v. Bailey*, 10 Cal. 230. So held where the land was leased from year to year for a part of the crop. *Sanderlin v. Shaw*, 6 Jones (N. C.) L. 225.

<sup>3</sup> *Wilson v. Douglas*, 2 Strobb. (S. C.) 97.

<sup>4</sup> *Dickson v. Boland*, 4 Pa. St. 112.

<sup>5</sup> *Gray v. Johnson*, 14 N. H. 414.

<sup>6</sup> *Jackson v. Ogden*, 4 Johns. (N. Y.) 140.

<sup>7</sup> *Jackson v. Vredenburg*, 1 Johns. (N. Y.) 159.

the event of the trial may affect the estate which he occupies, he has been held to be incompetent;<sup>1</sup> but if he has no interest in the subject-matter of the controversy, — as where the action is for an injury to the reversion, — he is competent.<sup>2</sup> He is competent for his landlord in an action of trespass committed on a part of the close occupied by him;<sup>3</sup> and so is one who is to have a lease of a part of the close from the plaintiff.<sup>4</sup> Again, he may testify for the landlord in his action against a stranger for removing a building from the land by the consent of the witness, for then his interest is adverse;<sup>5</sup> or, being the tenant of a mill to which a dam is appurtenant, he may testify for his landlord, who is sued in case for a nuisance by reason of the erection of the dam.<sup>6</sup> So, also, is he competent in an action by a sheriff who has levied on the goods of the witness, without notice of any rent being in arrear, against the landlord, who had distrained the same goods after the levy;<sup>7</sup> and where a third person brings replevin against the landlord for his goods distrained, he is competent to prove that the goods are the property of the landlord.<sup>8</sup> He is also competent to prove the terms of his hiring in a contest between the landlord and the execution creditor of the witness, as to the distribution of the proceeds of a sheriff's sale of his goods, found on the demised premises.<sup>9</sup>

On the other hand, it has been held that the tenant of the defendant in ejectment,<sup>10</sup> or of the complainant in forcible entry and detainer,<sup>11</sup> is incompetent, from interest, to testify in his landlord's favor. So, also, the lessee of a ferry is incompetent for his landlord when sued for a loss occurring during the witness' occupation of the ferry under his lease.<sup>12</sup> It seems that he may testify against his landlord when the latter is sued for use and occupation of the demised premises.<sup>13</sup>

<sup>1</sup> *Kuester v. Keck*, 8 Watts & S. (Pa.) 16.

<sup>2</sup> *Pennsylvania &c. Mfg. Co. v. Neel*, 54 Pa. St. 9.

<sup>3</sup> *Baker v. Pearce*, 4 Har. & M. (Md.) 502.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Forbes v. Williams*, 1 Jones (N. C.) L. 303.

<sup>6</sup> *Delweiler v. Groff*, 10 Pa. St. 376.

<sup>7</sup> *Alexander v. Mahon*, 11 Johns. (N. Y.) 185.

<sup>8</sup> *M'Conahy v. Kessler*, 3 Pa. 467.

<sup>9</sup> *Collin's appeal*, 35 Pa. St. 83.

<sup>10</sup> *Kennedy v. Reynolds*, 27 Ala. 364; *Doe v. President, &c.*, 7 Ind. 641; *Jackson v. Trusdell*, 12 Johns. (N. Y.) 246.

<sup>11</sup> *House v. Camp*, 32 Ala. 541.

<sup>12</sup> *Harris v. Plant*, 31 Ala. 639.

<sup>13</sup> *Grant v. Beall*, 4 Har. & M. (Md.) 419.

A tenant may testify for his co-tenant in an action brought by the latter to recover his share of the premises of a dis-seisor; he not being a party to the suit, and his interest being in the question only.<sup>1</sup> And after the expiration of the lease, a co-tenant is a competent witness to show that he had no beneficial interest in the lease, and joined in its execution merely as a surety for the payment of the rent by the other tenant.<sup>2</sup>

§ 64. **Mortgagor or Mortgagee.** — (1) *Mortgagor.* The common-law disqualification of a mortgagor as a witness was generally of a twofold character: he was, in most cases, incompetent both as a party to the suit, and as a person interested in the event. Thus in a proceeding to foreclose the mortgage, he does not become a competent witness by showing that he has conveyed the equity of redemption and therefore has no interest, for such showing does not entitle him to a nonsuit, and he still must remain a party.<sup>3</sup> And in such a suit, the mortgage being a purchase-money mortgage, the mortgagor cannot, after the death of the mortgagee, testify to admissions made by the latter of defects in the title he conveyed and warranted to the witness; nor that the mortgagee consented that a payment made by the witness to extinguish an adverse claim should be deemed to reduce the mortgage debt.<sup>4</sup> For similar reasons the mortgagor, though not liable on any covenants in his deed, cannot testify for the mortgagee in an action brought to recover possession of the land, where the possession sought by the demandant would be a payment *pro tanto* of the mortgage debt.<sup>5</sup> So also in ejectment by the mortgagee against one who claims under a quitclaim deed from the mortgagor, the latter is not a competent witness for the plaintiff.<sup>6</sup> Nor will a confession of judgment on a *sci. fa.* render him competent for the plaintiff in a *sci. fa.* on the mortgage against a terre-tenant.<sup>7</sup> And he has been held incompetent for either side in contests between prior and subsequent mortgagees.<sup>8</sup> Where the equity of

<sup>1</sup> Cook v. Brown, 34 N. H. 460.

<sup>6</sup> Jackson v. M'Chesney, 7 Cow.

<sup>2</sup> Jones v. Clark, 20 Johns. (N. Y.) 51.

(N. Y.) 360.

<sup>3</sup> Straw v. Greene, 14 Allen (Mass.) 206.

<sup>7</sup> Hartz v. Woods, 8 Pa. St. 471.

<sup>4</sup> Hart v. Carpenter, 36 Mich. 402.

<sup>8</sup> Beverly v. Brooke, 2 Leigh (Va.) 425; Sitlingtons v. Brown, 7 Id. 271. *Contra*, Willard v. Ramsburg, 22 Md. 206; Gilman v. Moody, 43 N. H. 239; Wilcox v. Hill, 11 Mich. 256.

<sup>5</sup> Howard v. Chadbourne, 3 Me. (3 Greenl.) 461.

redemption has been sold by the sheriff, and no decree of foreclosure is necessary as against him, the mortgagor may prove usury in the mortgage.<sup>1</sup> So may he where he has suffered a bill to foreclose to be taken *pro confesso* against him, where a creditor, party to the suit, attacks the mortgage as usurious.<sup>2</sup> And where he has conveyed subject to the mortgage, he may testify for his grantee to show payment of the mortgage, in an action for its cancellation and discharge, and this even against the executrix of the deceased owner of the mortgage.<sup>3</sup> So is he competent, when the mortgagee brings ejectment against a third person, to show that part of the mortgaged land was not his property, but was included in the mortgage by mistake.<sup>4</sup> And he may testify against the mortgagee, in favor of a judgment creditor, to show want of consideration in the mortgage.<sup>5</sup>

(2) *Mortgagee*. The same objection of interest often disqualified the mortgagee as a witness. Thus a mortgagee of previously attached property was so far interested in the event of the suit in which the attachment was made, as to be incompetent to testify therein.<sup>6</sup> And in an action by judgment creditors to set aside the mortgage as fraudulent, the mortgagor, mortgagee, and assignee of the mortgage being made parties, the mortgagee was held incompetent to prove that the assignee took in good faith, as this would tend to prevent a recovery against himself.<sup>7</sup> In some cases the mortgagee was deemed competent to testify for or against the mortgagor. Thus the mortgagee of an insured vessel whose debt had been paid by her sale after abandonment for a constructive total loss, and subsequent repair by the underwriters, was held competent for the mortgagor in an action by him against them for the loss;<sup>8</sup> and in a writ of entry by one who had mortgaged the land to secure a promissory note,

<sup>1</sup> *Brolasky v. Miller*, 1 Stock. (N.J.) 807. Compare *Cummins v. Wire*, 2rialst. (N. J.) 73; *Nichols v. Holgate*, 2 Aik. (Vt.) 138.

<sup>2</sup> *Post v. Dart*, 8 Paige (N. Y.) 639.

<sup>3</sup> *Beach v. Cooke*, 28 N. Y. 508.

<sup>4</sup> *Mott v. Clark*, 9 Pa. St. 399.

<sup>5</sup> *Lamar v. Simpson*, 1 Rich. (S. C.) Eq. 71. For other cases in which the mortgagor has been held competent, see *Price v. Magange*, 31 Ala. 701;

*Gunter v. Williams*, 40 Ala. 561; *Carter v. Champion*, 8 Conn. 549; *Miller v. Dillon*, 2 T. B. Mon. (Ky.) 73; *Howard v. Chadbourne*, 5 Mc. 15; *Foster v. Berkey*, 8 Minn. 351; *King v. Bailey*, 8 Mo. 332; *Gage v. Whittier*, 17 N. H. 312.

<sup>6</sup> *Rideout v. Newton*, 17 N. H. 71.

<sup>7</sup> *Perrin v. Johnson*, 16 Ind. 72.

<sup>8</sup> *Fulton Ins. Co. v. Goodman*, 32 Ala. 108.

the mortgagee was deemed a competent witness for the mortgagor.<sup>1</sup> So also a mortgagee who had assigned the mortgage was competent, in an action upon it, to prove that only part of the amount for which it purported to have been given was ever received by the mortgagor, and that the equitable plaintiff took it with knowledge of that fact; and this, though the original mortgagee, the nominal plaintiff, was an indorsee of the promissory note, which the mortgage had been given to secure.<sup>2</sup> On the other hand, in an action for use and occupation instituted by the mortgagor, the mortgagee was competent to prove that he entered for condition broken, and then leased the land to the defendant, and that the mortgage had been foreclosed.<sup>3</sup> And where the mortgagor brought a writ of entry against one to whom the mortgagee had conveyed the land with warranty, the mortgagee was held a competent witness for the defendant on being released from his covenants.<sup>4</sup>

§ 65. **Negotiable Paper,—Parties to.**—(1) *Generally.* According to the rule laid down in many of the earlier cases, no party to a negotiable instrument was competent to invalidate it by his own testimony, after he had given it credit and currency by his signature;<sup>5</sup> and the rule applied not only to actions directly upon the note, but to any litigation in which its validity came collaterally in question;<sup>6</sup> and included the case of one who signed the note as agent.<sup>7</sup> But the rule did not generally apply to instruments other than

<sup>1</sup> Woodman v. Skeetup, 35 Me. 464.

<sup>2</sup> Shrom v. Williams, 43 Pa. St. 520.

<sup>3</sup> Plympton v. Moore, 13 Pick. (Mass.) 191.

<sup>4</sup> Smith v. Smith, 15 N. H. 55. And see also Newkirk v. Burson, 21 Ind. 129; Rogers v. Traders' Ins. Co., 6 Paige (N. Y.) 583; Shay v. Pettees, 35 Ill. 360; Indianapolis & c. R. R. Co. v. Waggoner, 16 Ind. 367; Bigelow v. Smith, 2 Allen (Mass.) 264.

<sup>5</sup> Bank of the United States v. Dunn, 6 Pet. 51; Henderson v. Anderson, 3 How. 73; Ross v. Wells, 1 Stew. (Ala.) 139; Lane v. Padelford, 14 Me. 94; Churchill v. Suter, 4 Mass. 156; Parker v. Lovejoy, 3 Id. 535; Barker v. Prentiss, 6 Id. 430; Widgery v. Munroe, Id. 449; Jones v. Coolidge, 7 Id. 199; Coleman v. Wise, 2 Johns. (N. Y.)

165; Winton v. Saidler, 3 Johns.

(N. Y.) Cas. 185; Treon v. Brown, 14 Ohio, 482; Bodkins v. Taylor, Id. 489.

<sup>6</sup> Deering v. Sawtel, 4 Me. 191.

<sup>7</sup> Packard v. Richardson, 17 Mass. 122.

In a case decided at the December term, 1863, the Supreme Court of the United States say of this rule: "Perhaps no subject connected with commercial paper has been more the subject of controversy, and of opposing and well-balanced judicial decisions, than the proposition here relied on. It was first laid down in the English courts in the case of Walton v. Shelley (1 T. R. 206), and afterwards held the other way in Jordaine v. Lashbrooke (7 T. R. 601). This court, however, has steadily

such as were negotiated in the regular course of business before maturity.<sup>1</sup> In some States the rule was to admit parties to negotiable paper as witnesses, if not disqualified by interest;<sup>2</sup> and the current of early authorities indicates that they were deemed competent to testify to facts concerning the paper which had no tendency to show that it was originally void.<sup>3</sup>

(2) *Drawers of Bills.* Before the enabling acts,<sup>4</sup> the drawer of a bill of exchange was not generally deemed a competent witness for the plaintiff in an action on the bill against the acceptor, because of his liability to damages, interest, and costs, in case the suit should fail.<sup>5</sup> Nor could

adhered to the doctrine of *Walton v. Shelley*, and we are referred by counsel for plaintiffs in error to our own decisions on this subject in 6 Peters, 51; 8 Peters, 12; 3 Howard, 73; 13 Howard, 229.

"The rule propounded in *Walton v. Shelley* is, that a person who has placed his name on a negotiable paper as a party to it, shall not afterwards, in a suit on such security, be competent as a witness to prove any fact which would tend to impeach or invalidate the instrument to which he has thus given his name. The reason of it is, that it is against good morals and public policy to permit a person who has thus aided in giving currency and circulation to such paper, to testify to facts which would render such paper void, after he has thus imposed it upon the public as valid, with all the sanction which his name could give it." *Sweeny v. Easter*, 1 Wall (U. S.) 166, 173.

<sup>1</sup> *Rohrer v. Morning Star*, 18 Ohio, 579; *Fox v. Whitney*, 16 Mass. 118; *Park v. Smith*, 4 Watts & S. (Pa.) 287.

<sup>2</sup> *Bank of Missouri v. Hulf*, 7 Mo. 273; *Farrar v. Metts*, 12 Rich. (S. C.) 667.

<sup>3</sup> *Wendell v. George*, R. M. Charlt. (Ga.) 51; *Buck v. Appleton*, 14 Me. 284; *Woodhull v. Holmes*, 10 Johns. (N. Y.) 231; *Appleton v. Donaldson*, 3 Pa. St. 381; *Pennypacker v. Umberger*, 22 Id. 492; *Warren v. Merry*, 3 Mass. 27; *Barker v. Prentiss*, 6 Id.

430, 434; *Parker v. Hanson*, 7 Id. 470; *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565; *Smith v. Downs*, 6 Conn. 365; *Crayton v. Collins*, 2 McCord, (S. C.) 457.

In the following cases parties to negotiable paper were rejected as witnesses: *Huff v. Freeman*, 15 La. Ann. 240; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Miley v. Todd*, 17 Pa. St. 101. In *Starr v. Johnson* (Ga. Dec. Pt. II. 134) it was held that a party to the paper, who was not a party to the suit, was competent; and in *Sibley v. Lambert* (30 Me. 253) the words "property of A" written on the margin of the note sued on were held not to show such an interest in A at the time of trial as to render him incompetent to testify. Again, in *Quinlan v. Davis* (6 Whart. (Pa.) 169), a person who expected to receive part of the consideration of the note sued on, was admitted as a witness for the maker when sued on the note; and in *Connor v. Bradey* (Anth. (N. Y.) 99) the real plaintiff in interest was allowed to be examined in a suit on a promissory note. See also *Gray v. Morcy*, 26 Ill. 409; *Packard v. Nye*, 2 Metc. (Mass.) 47; *Columbia Coat & Co. v. Fox*, 33 Pa. St. 239.

<sup>4</sup> *Infra*, Chap. VIII.

<sup>5</sup> *Scott v. McLellan*, 2 Me. 199; *Hewitt v. Lovering*, 12 Me. 201; *Dennistoun v. Fleming*, 7 Pa. St. 528. But see *Pacific Bank v. Mitchell*, 9 Metc. (Mass.) 297; *Barney v. Newcome*, 9 Cush. (Mass.) 46.

he prove the usurious character of the bill in such an action,<sup>1</sup> or in an action by an indorsee against his indorser.<sup>2</sup>

(3) *Acceptors*. Where the indorsee of a bill of exchange brings an action upon it against the drawer, the acceptor is a competent witness to prove that he has not had in his hands any funds of the drawer.<sup>3</sup> And in an action between the drawer and drawee of an order for goods, the person on whom the order is drawn is a competent witness to prove its acceptance.<sup>4</sup>

(4) *Makers of Notes*. In an action by the holder against an indorser, the maker is competent to prove an alteration in the paper after it left his hands, his liability for costs having been first released.<sup>5</sup> And many early decisions hold him competent, as a general witness, in such an action.<sup>6</sup> Thus, he may prove protest and notice;<sup>7</sup> or that the note sued on was indorsed to the plaintiff for collection only, and not for his benefit.<sup>8</sup> So he may testify as to the execution of the note by himself and partners, as makers, and the indorsement of it by the defendant;<sup>9</sup> and the circumstances

<sup>1</sup> *Nichols v. Wright*, 4 Cranch, C. C. 700; *Jones v. Brook*, 4 Taunt. 464. *Contra*, *Rich v. Topping*, Peake, N. P. 224; *Brand v. Ackerman*, 5 Esp. 119. But on being released from liability to costs, he was admitted for the acceptor to show that plaintiff was not the owner of the bill. *Snyder v. Wilt*, 15 Pa. St. 59.

<sup>2</sup> *Saltmarsh v. Tuthill*, 13 How. (U.S.) 229. Thus, in an action on a promissory note, the drawer of an order was held incompetent for the defendant, to prove that the plaintiff accepted such order in payment of the note. *Huntington v. Champlin*, Kirby (Conn.) 166. And in a joint action against the drawer and indorsers of a bill, each defendant is interested in the costs, and therefore incompetent to testify. *Scott v. Watkins*, 10 Miss. 233. But the drawer was held competent to prove that he had received notice of non-acceptance. *Whiteford v. Burckmeyer*, 1 Gill (Md.) 127; also that the acceptance was conditional. *Storer v. Logan*, 9 Mass. 55; also that the bill was given on a gaming consideration, *Hubner v. Richardson*,

*Manning's Index*, 327; or that it had been paid. *Humphrey v. Moxon*, Peake, N. P. 52.

<sup>3</sup> *Kinsley v. Robinson*, 21 Pick. (Mass.) 327.

<sup>4</sup> *Tarble v. Underwood*, 34 Ill. 67.

<sup>5</sup> *Frazer v. Carpenter*, 2 McLean (U. S.) 235.

<sup>6</sup> See among others *Griffing v. Harris*, 9 Port. (Ala.) 225; *Adams v. Moore*, Id. 406; *Cockrill v. Hobson*, 16 Ala. 391; *Woodman v. Eastman*, 10 N. H. 359; *Hubbly v. Brown*, 16 Johns. (N. Y.) 70; *Finn v. Gustin*, 4 E. D. Smith (N. Y.) 382. *Contra*, *Bank of Metropolis v. Jones*, 8 Pet. (U. S.) 12; *Davenport v. Freeman*, 3 Watts & S. (Pa.) 557. See also *Bank of Columbia v. French*, 1 Cranch, C. Ct. 221; *Knowles v. Parrot*, 2 Id. 93; *White v. Burns*, 5 Id. 123.

<sup>7</sup> *Eddy v. Peterson*, 22 Ill. 535.

<sup>8</sup> *Gilman v. Pugh*, 1 Litt. (Ky.) 286. Compare *Thompson v. Bank of Gettysburg*, 3 Grant (Pa.) Cas. 119.

<sup>9</sup> *Crowley v. Barry*, 4 Gill (Md.) 194. See also *Hopkinson v. Steel*, 12 Vt. 582.

under which the indorsement was made.<sup>1</sup> And he may impeach the note, if dishonored by indorsement on the last day of grace.<sup>2</sup> So, in trover for the note, he may testify in favor of the defendant;<sup>3</sup> and it was abundantly settled that he was competent to prove the usurious character of the note.<sup>4</sup> He could also testify that the note (a firm note) was given by one partner for his individual debt;<sup>5</sup> or that it had been paid;<sup>6</sup> or that the note was made payable to the payee at the request of a person to whom the witness was indebted at the time.<sup>7</sup> The suit being by the payee against the witness, he was permitted to show a parol agreement, on the part of the plaintiff, made when the note was given, to consider certain services, rendered since that time as payment thereof.<sup>8</sup>

Some of the cases only go so far as to hold the maker competent after judgment against him on the note, in which case his interest is equally balanced.<sup>9</sup> Thus, if he suffered a default, he could testify.<sup>10</sup> And the rule was the same where his liability on the note was barred by the statute of limitations;<sup>11</sup> or by a discharge in bankruptcy;<sup>12</sup> or when he was released by the party in whose favor he was called to testify.<sup>13</sup>

Where one of the parties to the suit was a surety on the note, the principal maker was held competent to testify

<sup>1</sup> *Schley v. Merritt*, 37 Md. 352. Compare *Saurman v. Bodey*, 42 Pa. St. 476.

<sup>2</sup> *Pine v. Smith*, 11 Gray (Mass.) 38.

<sup>3</sup> *Woodruff v. Smith*, 1 Halst. (N. J.) 214.

<sup>4</sup> *Howell v. Auten*, 1 Green (N. J.) 41; *Cushman v. Downing*, 29 Me. 450; *Stafford v. Rice*, 5 Cow. (N. Y.) 23; *Bank of Utica v. Hillard*, Id. 153; *Van Schaack v. Stafford*, 12 Pick. (Mass.) 565; *Townsend v. Bush*, 1 Conn. 260; *Hunt v. Edwards*, 4 Har. & J. (Md.) 283; *Winkler v. Scudder*, 1 Ga. 108; *Flemming v. Mulligan*, 2 McCord (S. C.) 173; *Little v. Rogers*, 1 Metc. (Mass.) 108; *Griffith v. Reford*, 1 Rawle (Pa.) 196; *Moyer v. Gunn*, 12 Wis. 385. To the contrary, see *Hartford Bank v. Barry*, 17 Mass. 94; *Churchill v. Suter*, 4 Id. 156; *Manning v. Wheatland*, 10 Id. 502; *Houghton v. Page*, 1 N. H. 60.

<sup>5</sup> *Williams v. Walbridge*, 3 Wend. (N. Y.) 415.

<sup>6</sup> *Fry v. Coleman*, 1 Grant (Pa.) Cas. 445. *Contra*, *Moore v. Henderson*, 18 Ala. 232; *Palmer v. Tripp*, 6 Cal. 82.

<sup>7</sup> *Lewis v. Carsaw*, 15 Pa. St. 31.

<sup>8</sup> *Hagood v. Swords*, 2 Bailey (S. C.) 305.

<sup>9</sup> *Vance v. Collins*, 6 Cal. 435; *Routh v. Helm*, 6 How. (Miss.) 127; *Kleinmann v. Boernstein*, 32 Mo. 311; *Bank of Columbia v. Magruder*, 6 Har. & J. (Md.) 172.

<sup>10</sup> *Austin v. Fuller*, 12 Barb. (N. Y.) 360; *Mevey v. Matthews*, 9 Pa. St. 112. But a mere verdict against him did not make him competent. *Haig v. Newton*, 1 Mill (S. C.) Const. 423.

<sup>11</sup> *Breitenbach v. Houtz*, 35 Pa. St. 153.

<sup>12</sup> *Hayden v. McKnight*, 45 Ga. 147.

<sup>13</sup> *Franklin Bank v. Pratt*, 31 Me. 501; *Peirce v. Butler*, 14 Mass. 303; *Wheaton v. Wilmarth*, 13 Metc. (Mass.) 422; *Bank v. Fordyce*, 9 Pa. St. 275.



against the surety, where he had indemnified him by a deposit with him sufficient to cover the amount which could be recovered in the suit.<sup>1</sup> So, other decisions hold that the payee (plaintiff) may examine the maker to charge the guarantor.<sup>2</sup> And it is held that in such an action he may testify in favor of the surety when the suit is against the latter,<sup>3</sup> provided he be released by the surety.<sup>4</sup>

Where there were two or more joint makers, the prevalent rule was that one of them was not a competent witness for another, without a release from liability to contribution.<sup>5</sup> The suffering a default,<sup>6</sup> or the pendency of proceedings in bankruptcy,<sup>7</sup> or the fact that the proposed witness made no defence,<sup>8</sup> did not alter the rule; nor did the fact that he was not joined as a defendant qualify him to testify for his co-maker,<sup>9</sup> even though the period of limitation had elapsed, thus barring a future suit against him.<sup>10</sup> Conversely, he was not allowed to testify against his co-promisor, his interest being to charge the latter,<sup>11</sup> even to prove the execution of the note by the defendant.<sup>12</sup>

(5) *Indorsers of Bills or Notes.* Where the action is by indorsee against drawer, maker, or acceptor, an indorser is

<sup>1</sup> Gayle v. Bishop, 14 Ala. 552. See also Wright v. Lewis, 18 Ala. 194.

<sup>2</sup> Knoeble v. Kircher, 33 Ill. 308; Perry v. Swasey, 12 Cush. (Mass.) 36; Taylor v. McCune, 11 Pa. St. 460.

<sup>3</sup> Mitchell v. Cotten, 1 Fla. 136; Freeman's Bank v. Rollins, 13 Me. 202. *Contra*, see McGinnes v. McGinnes, 23 Ga. 613; Newells v. Salmons, 22 Barb. (N. Y.) 647; Strong v. Grannis, 26 Id. 122. Thus he was allowed to prove that the sureties had been discharged by the plaintiff. Greeley v. Dow, 2 Metc. (Mass.) 176. See also Chaffee v. Jones, 19 Pick. (Mass.) 260; Bell v. Wilson, 17 Ohio St. 640.

<sup>4</sup> Bank of Limestone v. Penick, 5 T. B. Mon. (Ky.) 25; Lamb v. Fox, 5 B. Mon. (Ky.) 94; Barnett v. Troutman, 9 Ga. 36; Jones v. Fleming, 15 La. Ann. 522; Hill v. Sweetser, 5 N. H. 168; Hogg v. Breckenridge, 12 Mo. 369; Haines v. Dennett, 11 Id. 180, where he was permitted to prove that the words "or order" were inserted in the note after the surety had

signed it, and without his knowledge; and this, where the plaintiff was an innocent indorsee for value.

<sup>5</sup> Marine Bank v. Ferry, 40 Ill. 255; Commercial &c. Bank v. Lum, 8 Miss. 414; Ames v. Withington, 3 N. H. 115; Carleton v. Whitaker, 5 Id. 196; Jewett v. Davis, 6 Id. 518; Miller v. McCogg, 4 Hill (N. Y.) 35; Groat v. Palmer, 7 Wis. 338.

<sup>6</sup> Smith v. Chase, 34 Me. 592.

<sup>7</sup> Wolf v. Finks, 1 Pa. St. 435; Madison Ins. Co. v. Mitchell, 1 Ind. 384.

<sup>8</sup> Turner v. Lagarus, 6 Ala. 875.

<sup>9</sup> Kornegay v. Sallé, 12 Ala. 534; Concord Bank v. Rogers, 16 N. H. 9; Kile v. Graham, 1 McCord (S. C.) 552. *Contra*, Thompson v. Armstrong, 5 Ala. 383.

<sup>10</sup> Whipple v. Stevens, 19 N. H. 150.

<sup>11</sup> McCall v. Sinclair, 14 Ala. 704.

<sup>12</sup> Marshall v. Thrailkill, 12 Ohio, 275; Armstrong v. Deshler, Id. 475; Harvey v. Swasey, 4 Humph. (Tenn.) 449.

generally held competent for either party, as he stands indifferent between them;<sup>1</sup> unless it appear that the action is prosecuted for his immediate benefit.<sup>2</sup> He is competent in such a case for almost any other purpose than that of impeaching the genuineness of the paper sued on, or its payment before suit brought.<sup>3</sup> Thus where the note sued on was overdue at the time the witness indorsed it he may testify to the time when it was negotiated, and to any other facts which happened prior to that time, and which do not affect the original validity of the note.<sup>4</sup>

So he may testify to the execution of the note,<sup>5</sup> or that the indorsement was in trust for persons other than the holders,<sup>6</sup> or to facts which transpired after the paper had passed out of his hands.<sup>7</sup> In such a case, his liability to either party being the same, he may prove a prior indorsement alleged to have been a forgery.<sup>8</sup> He may testify that he has paid the note in suit, and that the plaintiff is but a trustee for him.<sup>9</sup>

On the other hand, numerous cases uphold the contrary doctrine, denying the competency of an indorser, where the effect of his testimony would be to charge any party to the instrument whose liability was anterior to that of the wit-

<sup>1</sup> *Stevens v. Lynch*, 12 East, 38; s. c., 2 Campb. 332; *Birt v. Kershaw*, 2 East, 458; *Reay v. Packwood*, 7 Ad. & E. 917; *Bryant v. Watriss*, 13 Cal. 85; *Priest v. Bounds*, 25 Cal. 188; *Berry v. Hall*, 33 Me. 493; *Whiteford v. Munroe*, 17 Md. 135; *Zeigler v. Gray*, 12 S. & R. (Pa.) 42; *Oliver v. President & c.*, 11 Humph. (Tenn.) 74.

<sup>2</sup> *Tomlinson v. Spencer*, 5 Cal. 291. See also *Partee v. Silliman*, 44 Miss. 272.

<sup>3</sup> *Curtis v. Marrs*, 29 Ill. 508; *Buck v. Appleton*, 14 Me. 284.

<sup>4</sup> *Adams v. Carver*, 6 Mc. 390. *S. P. Smithwick v. Anderson*, 2 Swan (Tenn.) 573.

<sup>5</sup> *Goodwin v. Chadwick*, 35 Me. 193; *Richardson v. Lincoln*, 5 Metc. (Mass.) 201.

<sup>6</sup> *Barker v. Prentiss*, 6 Mass. 430.

<sup>7</sup> *Drake v. Henly*, 1 Miss. (Walk.) 541; *Girard Ins. Co. v. Marr*, 46 Pa. St. 504.

<sup>8</sup> *Ellis v. Bervellier*, 15 Ohio, 489.

<sup>9</sup> *Maynard v. Nekerviss*, 9 Pa. St. 81.

*S. P. Warren v. Merry*, 3 Mass. 27; *White v. Kibling*, 11 Johns. (N. Y.) 128; *Bryant v. Ritterbush*, 2 N. H. 212. *Contra*, *Nisbet v. Lawson*, 1 Ga. 275. Other cases only go so far as to hold the indorser competent where his liability has been in any way discharged. *Todd v. Hardy*, 9 Port. (Ala.) 346; *Carroll v. Meeks*, 3 Id. 226; *Briggs v. Moore*, 14 Ala. 433; *Bradley v. Morris*, 4 Ill. 182; *Evans v. Smith*, 34 Me. 33; *Locke v. Noyes*, 9 N. H. 430; *Farmers' Bank v. Griffith*, 5 Hill (N. Y.) 476; *Bay v. Gunn*, 1 Den. (N. Y.) 108; *Hepburn v. Cassel*, 6 S. & R. (Pa.) 113. As where the witness has become bankrupt, *Murray v. Marsh*, 2 Hayw. (N. C.) 290, or received his discharge under an insolvent law. *Murray v. Judah*, 6 Cow. (N. Y.) 484. See also *Isbell v. Brown*, 13 Ala. 383; *Smith v. Northern Bank*, 1 Metc. (Ky.) 575; *Juniata Bank v. Brown*, 5 S. & R. (Pa.) 226; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237; *Tilden v. Gardner*, 25 Wend. (N. Y.) 663.

ness;<sup>1</sup> even though he swore that he had disposed of all his interest in the note, and believed himself no longer responsible on his indorsement.<sup>2</sup>

Again, the earlier cases strenuously upheld the doctrine that an indorser of commercial paper should in no case be permitted, as a witness, to impeach the original validity of the paper to which he had lent currency by his indorsement.<sup>3</sup>

Many American cases uphold this early English rule,<sup>4</sup> and the witness has been held incompetent even after a confession of judgment by him,<sup>5</sup> or even after being released from all liability to the plaintiff.<sup>6</sup> Thus, he was not permitted to prove that the bill sued on, though indorsed, still remained the property of the payees;<sup>7</sup> or that when the defendant (the maker) signed the note in suit, the plaintiff (indorsee) agreed not to call on him for payment in any event;<sup>8</sup> or that in pursuance of an agreement between himself and the holder, the note had not been protested;<sup>9</sup> nor could he testify as to the handwriting of the maker.<sup>10</sup>

<sup>1</sup> *Kennon v. M'Rae*, 2 Port. (Ala.) 389; *Herrick v. Whitney*, 15 Johns. (N. Y.) 240; *Presbury v. Papin*, 31 Mo. 490; *Williams v. Brailsford*, 25 Md. 126; *Soul v. Dawes*, 6 Cal. 473; *Craig v. Andrews*, 7 Iowa, 17; *Williams v. Banks*, 11 Md. 198. Compare *Gorham v. Carroll*, 3 Litt. (Ky.) 221.

<sup>2</sup> *Baskins v. Wilson*, 6 Cow. (N. Y.) 471.

<sup>3</sup> The leading English case taking this view is *Walton v. Shelley*, 1 T. R. 396, where an indorser of a note was called as a witness to impeach its validity. He was held incompetent, the court applying the maxim, "Nemo, allegans suam turpitudinem, est audiendus," and saying that it was "of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it."

The next case was *Jordaine v. Lashbrooke*, 7 T. R. 599, where the doctrine of *Walton v. Shelley* was overruled, and the English rule has since been that the indorser is competent to impeach the validity of the

paper, unless he is directly interested in the event of the suit, or on other grounds, disqualified.

<sup>4</sup> *Walters v. Smith*, 23 Ill. 342; *Walters v. Witherell*, 43 Ill. 388; *Lincoln v. Fitch*, 42 Me. 456; *Harding v. Mott*, 20 Pa. St. 469.

<sup>5</sup> *Taylor v. Beck*, 3 Rand. (Va.) 316. *S. P. Hayes v. Gorham*, 3 Ill. 429.

<sup>6</sup> *Ward v. Tyler*, 52 Pa. St. 393. See also *Steinmetz v. Curric*, 1 Dall. (U. S.) 234.

<sup>7</sup> *Mitchell v. Cooper*, 17 Pa. St. 343.

<sup>8</sup> *Jarden v. Davis*, 5 Whart. (Pa.) 338.

<sup>9</sup> *Hinckley v. Walters*, 9 Watts (Pa.) 179.

<sup>10</sup> *Geoghegan v. Reid*, 2 Whart. (Pa.) 152. In addition to those already cited, the following American cases uphold the rule that the indorser of negotiable paper, indorsed when not overdue, cannot impeach it in the hands of an innocent indorsee. *Scott v. Lloyd*, 12 Pet. (U. S.) 145; *Bank of Metropolis v. Jones*, 8 Id. 12; *Bank of U. S. v. Dunn*, 6 Id. 57. But the Supreme Court of the United States steadily refuse to apply the rule to

The rule laid down in *Walton v. Shelley* is also adhered to in some later cases in the Supreme Court of the United States;<sup>1</sup> but in many of the State courts of last resort it has been rejected, and the general doctrine of *Jordaine v. Lashbrook* followed.<sup>2</sup>

When the indorser is offered to prove that the bill or note sued on was rendered void at its inception by reason of the usurious character of the contract itself, or in the rate of discount taken, the weight of authority is in favor of his competency;<sup>3</sup> and the better opinion is that he may also be admitted to prove want of consideration for the paper.<sup>4</sup>

other papers. *United States v. Leffler*, 11 Pet. (U. S.) 86. *Henderson v. Anderson*, 3 How. (U. S. 73). Numerous decisions of State courts, also, rendered before the passage of the several enabling statutes, will also be found to sustain the rule. *Webster v. Vickers*, 2 Ill. 295; *Walters v. Witherell*, 43 Ill. 388; *Dewey v. Warriner*, 71 Ill. 198; *Shomburg v. Commagere*, 10 Mart. (La.) 179; *Cox v. Williams*, 17 Mart. (La.) 18; *Deering v. Sawtel*, 4 Me. 191; *Chandler v. Morton*, 5 Me. 374; *Clapp v. Hanson*, 15 Me. 345; *Franklin Bank v. Pratt*, 31 Me. 501; *Lincoln v. Fitch*, 42 Me. 456; *Churchill v. Sutor*, 4 Mass. 156; *Fox v. Whitney*, 16 Mass. 118. In the last case it is held that the rule applies to indorsers, but not to the original parties. See also, to same effect, *Davis v. Brown*, 94 U. S. 427. *Packard v. Richardson*, 17 Mass. 122; *Thayer v. Crossman*, 1 Metc. (Mass.) 416, where the rule is held not to apply to the case of a note indorsed when overdue or dishonored. *S. P. Parke v. Smith*, 4 Watts & S. (Pa.) 287; *Drake v. Henley*, Walk. (Mich.) 541; *Hadduck v. Wilmarth*, 5 N. H. 187; *Stone v. Vance*, 6 Ohio, 246; *Treon v. Brown*, 14 Ohio, 482; *Bodkins v. Taylor*, 14 Ohio, 489; *Rohner v. Morning Star*, 18 Ohio, 579; *O'Brien v. Davis*, 6 Watts (Pa.) 498; *Harrisburg Bank v. Forster*, 8 Watts (Pa.) 304; *Davenport v. Freeman*, 3 Watts & S. (Pa.) 557; *Gaul v. Willis*, 26 Pa. St. 259; *Nichols v. Holgate*, 2 Aik. (Vt.) 138. But see *Chandler v.*

*Mason*, 2 Vt. 198, where this case is disapproved.

<sup>1</sup> *Smyth v. Strader*, 4 How. (U. S.) 404; *Sweeny v. Easter*, 1 Wall. (U. S.) 173.

<sup>2</sup> *Todd v. Stafford*, 1 Stew. (Ala.) 199; *Griffing v. Harris*, 9 Port. (Ala.) 226; *Townsend v. Bush*, 1 Conn. 260; *Slack v. Moss*, Dud. (Ga.) 161; *Ringgold v. Tyson*, 3 Har. & J. (Md.) 172; *Freeman v. Britton*, 2 Harr. (N. J.) 192; *Stafford v. Rice*, 5 Cow. (N. Y.) 23; *Bank of Utica v. Hilliard*, Id. 153; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Guy v. Hall*, 3 Murph. (N. C.) 151; *Knight v. Packard*, 3 McCord (S. C.) 71; *Stump v. Napier*, 2 Yerg. (Tenn.) 35; *Taylor v. Beck*, 3 Rand. (Va.) 316.

<sup>3</sup> *Tucker v. Wilamonicz*, 8 Ark. 157; *Bubier v. Pulsifer*, 4 Gray (Mass.) 592; *Freeman v. Brittin*, 2 Harr. (N. J.) 191; *Heath v. Everson*, Id. 245; *Tuthill v. Davis*, 20 Johns. (N. Y.) 285; *Bank of Auburn v. Walter*, 23 Barb. (N. Y.) 441; *Truscott v. Davis*, 4 Id. 495; *Knight v. Packard*, 3 McCord (S. C.) 71. To the contrary, see *Mann v. Swann*, 14 Johns. (N. Y.) 270; *Myers v. Palmer*, 18 Id. 167; *Knights v. Putnam*, 3 Pick. (Mass.) 184. So, also, it seems he may disprove the alleged usury. *Barrets v. Snowden*, 5 Wend. (N. Y.) 181.

<sup>4</sup> *Webster v. Vickers*, 3 Ill. 295. *Contra*, *Stille v. Lynch*, 2 Dall. (U. S.) 194; *Dewey v. Warriner*, 71 Ill. 198; *Harrisburg Bank v. Foster*, 8 Watts (Pa.) 304.

Thus, the note having been negotiated when overdue, he may prove that it had been paid before such negotiation.<sup>1</sup>

Where the indorsement is special, *e.g.*, "without recourse,"<sup>2</sup> or "for collection,"<sup>3</sup> or where at the time of indorsement some agreement is made with the holder restricting the liability of the indorser,<sup>4</sup> the latter is a competent witness in an action on the paper so indorsed.

(6) *Guarantors or Sureties*. It has been decided that a guarantor of a promissory note, the effect of whose testimony would be to render himself liable thereon, is a competent witness for the defendant in a suit against the maker, to prove payment of the debt for which the note had been pledged;<sup>5</sup> but a guarantor "to pay the execution which may be recovered on" a certain note, "in the lifetime of said execution," is interested to lessen the amount to be recovered, and is not competent to prove a partial failure of consideration.<sup>6</sup> So, also, the guarantor or fraudulent assignor of a note is not a competent witness for the assignee, in an action against the maker, to support the consideration.<sup>7</sup> And a guarantor of the solvency of the maker is not a competent witness to prove that the note was given without consideration.<sup>8</sup>

The suit being against the principal maker, a surety not sued may testify for the maker.<sup>9</sup> And he may show usury in the note or transaction out of which it originated.<sup>10</sup> So, also, where two persons are sureties for the maker, and payment of the note is enforced from one of them, in an action by him against the principal to recover the amount of money so advanced, the other surety is a competent witness for the plaintiff.<sup>11</sup>

<sup>1</sup> *American Bank v. Jenness*, 2 Metc. (Mass.) 288; *Thayer v. Crossman*, 1 Id. 416; *Rosevelt v. Gardner*, 2 Penn. (N. J.) 791.

<sup>2</sup> *Boyd v. McIvor*, 14 Ala. 593; *Bailey v. Lumpkin*, 1 Ga. 392; *Merritt v. Merritt*, 20 Ill. 65; *Abbott v. Mitchell*, 18 Me. 355; *Billingsly v. Knight*, Term (N. C.) 103. *Contra*, *Cummings v. Fisher*, Anth. (N. Y.) 1.

<sup>3</sup> *Sweeny v. Easter*, 1 Wall. (U. S.) 166; *Perry v. Siter*, 37 Mo. 273.

<sup>4</sup> *Davis v. Brown*, 94 U. S. 423. In this case the note was not transferred

after the making of the agreement, and *Walton v. Shelley and Anderson v. Dunn* are distinguished and limited.

<sup>5</sup> *Mayo v. Avery*, 18 Cal. 309.

<sup>6</sup> *Paine v. Hussey*, 17 Me. 274.

<sup>7</sup> *Brodnax v. Brodnax*, 13 Sm. & M. (Miss.) 369.

<sup>8</sup> *Hanna v. Spencer*, 3 Ind. 351.

<sup>9</sup> *Atwood v. Wright*, 29 Ala. 346.

<sup>10</sup> *Webb v. Wilshire*, 19 Me. 406; *Phillips v. Caldwell*, 2 Rich. (S. C.) 1; *Nichols v. Bellows*, 22 Vt. 581.

<sup>11</sup> *Benedict v. Hecox*, 18 Wend. (N. Y.) 490. See *infra*, § 74.

(7) *Holders or Payees.* In an action by a transferee of a bill or note against the maker or drawer, the payee, especially if released,<sup>1</sup> or not legally interested,<sup>2</sup> was generally admitted as a witness, to prove the execution of the paper sued on,<sup>3</sup> or a subsequent agreement between the maker and himself, by which the note was to be extinguished,<sup>4</sup> or to show the time,<sup>5</sup> or circumstances and terms under which the indorsement to plaintiff was made,<sup>6</sup> or the genuineness of the maker's signature,<sup>7</sup> or to prove the consideration.<sup>8</sup> So he was competent where his indorsement to the plaintiff was "without recourse,"<sup>9</sup> or after maturity,<sup>10</sup> or the transfer was by delivery only.<sup>11</sup>

Where the suit was against a subsequent indorser, the payee was held competent to testify to any fact which did not impeach the genuineness of the paper, or go to its discharge before or at the time when he parted with it.<sup>12</sup>

It was generally held that in an action by a subsequent holder against the maker, the payee was competent to impeach the validity of the note by showing want or failure of consideration,<sup>13</sup> or alteration in a material part,<sup>14</sup> or that the paper was not transferred in the due course of trade.<sup>15</sup> In one case the payee was permitted to prove that the note sued on was given without consideration, and that after it

<sup>1</sup> *Matheny v. Westfall*, 4 Blackf. (Ind.) 491; *Leonard v. Wildes*, 36 Me. 265.

<sup>2</sup> *School District v. Rogers*, 8 Iowa, 316.

<sup>3</sup> *Matheny v. Westfall*, *supra*.

<sup>4</sup> *Nash v. East*, 19 La. Ann. 165.

<sup>5</sup> *Spring v. Lovett*, 11 Pick. (Mass.) 417.

<sup>6</sup> *Davis v. Sawtelle*, 30 Me. 389; *Stone v. Vance*, 6 Ohio, 246.

<sup>7</sup> *Bigelow v. Heyer*, 3 Allen (Mass.) 243.

<sup>8</sup> *Evans v. Dela*, 35 Pa. St. 451. See *Dela v. Evans*, 3 Phil. (Pa.) 397.

<sup>9</sup> *Edgerly v. Shaw*, 25 N. H. 514.

<sup>10</sup> *Seeley v. Engell*, 17 Barb. (N. Y.) 530; *Lane v. Padelford*, 14 Me. 94.

<sup>11</sup> *Evans v. Dela*, *supra*; *Calkins v. Packer*, 21 Barb. (N. Y.) 275.

The principles stated in the text seem to be in accordance with the great weight of authority, but there is no lack of respectable decisions which

hold that the payee of a promissory note, who has negotiated it, is not a competent witness for a subsequent holder in an action against the maker. *Bailey v. Knapp*, 19 Pa. St. 192; *Halz v. Snyder*, 26 Id. 511; *Foreman v. Ahl*, 55 Id. 325. Compare, as sustaining the text, *Smith v. Richmond*, 19 Cal. 476; *Slack v. Moss*, Dud. (Ga.) 161; *Nichols v. Artman*, Harp. (S. C.) 285.

<sup>12</sup> *Rives v. Marrs*, 25 Ill. 315. That the payee of a note payable to bearer is competent, see *Rich v. Dupree*, 14 Ga. 661; *Whitaker v. Brown*, 8 Wend. (N. Y.) 490. *Contra*, see *Rice v. Stearns*, 3 Mass. 225. And see *Davidson v. Love*, 1 Ala. 133.

<sup>13</sup> *Davidson v. Love*, *supra*; *Manning v. Manning*, 8 Ala. 138 (a gaming note); *State Bank v. Seawell*, 18 Ala. 616; *Hawkins v. Cree*, 37 Pa. St. 494.

<sup>14</sup> *Smith v. Cheney*, 1 Hill (S. C.) 148.

<sup>15</sup> *Bailey v. Cooper*, 5 Humph. (Tenn.) 400.

had been paid and given up to the promisor, it was again placed in the hands of the payee for another purpose than that of being paid, and that a subsequent indorser took it with notice of all these facts.<sup>1</sup> In all these cases the objection goes to the credibility, not to the competency of the witness; but a contrary rule is maintained in some jurisdictions.<sup>2</sup>

Again, the weight of opinion is that the payee may prove that the note had been paid to him before he transferred it,<sup>3</sup> or that it was tainted with usury.<sup>4</sup> So, also, in support of the action, where the maker's defence is the statute of limitations, the payee may prove a new promise within the six years,<sup>5</sup> or a partial payment relied on to take the case out of the statute;<sup>6</sup> such testimony being clearly against interest.

(8) *Parties to Accommodation Paper.* The early cases deny the competency of the maker of an accommodation note to testify for the accommodation indorser, in an action against the latter by the holder, on the ground of the maker's interest, even where that interest is limited to the question of costs;<sup>7</sup> and the same rule of exclusion was applied to the drawer of a bill, whose testimony was offered by the acceptor when sued by the holder.<sup>8</sup> Thus, the maker or drawer was not permitted even to show usury in such cases,<sup>9</sup> and that, too, where the usurer himself was the

<sup>1</sup> Fish v. French, 15 Gray (Mass.) 520.

<sup>2</sup> Wilson v. Walker, 4 Houst. (Del.) 96; Coon v. Nock, 27 Ill. 235; Strang v. Wilson, 1 Morr. (Iowa) 84; Clapp v. Hanson, 15 Me. 345; Kobbe v. Landecker, 32 Mo. 170; Rosenberger v. Bitting, 15 Pa. St. 278; Foreman v. Ahl, 55 Id. 325.

<sup>3</sup> Smith v. Morgan, 38 Me. 468; Williams v. Miller, 10 Sm. & M. (Miss.) 139; Fitch v. Hill, 11 Mass. 286; Bryant v. Ritterbush, 2 N. H. 212; Bobo v. Bostick, 2 Bail. (S. C.) 106.

<sup>4</sup> Harvey v. Ellithorpe, 26 Ill. 418; Richards v. Marshman, 2 Greene (Iowa) 217; Prather v. Lentz, 6 Blackf. (Ind.) 244; Ringgold v. Tyson, 3 Har. & J. (Md.) 172.

<sup>5</sup> Howe v. Thompson, 11 Me. 152.

<sup>6</sup> Sibley v. Lumbert, 30 Me. 253. See also Jones v. Hake, 2 Johns.

(N. Y.) Cas. 60; Williams v. Matthews, 3 Cow. (N. Y.) 252; Beggs v. Butler, 9 Paige (N. Y.) 226; Wallace v. McElevy, 2 Grant (Pa.) Cas. 44; Scull v. Mason, 43 Pa. St. 99; Benior v. Paquin, 40 Vt. 199, in all of which cases the holder of the paper was held competent; and compare Harbin v. Roberts, 33 Ga. 45; Cushman v. Downing, 29 Me. 459; Shaver v. Ehle, 16 Johns. (N. Y.) 201; Brown v. Street, 6 Watts & S. (Pa.) 221, where the contrary was held.

<sup>7</sup> Chur v. Keckelely, 1 Bail. (S. C.) 479; Bank of Charleston v. Chambers, 11 Rich. (S. C.) 657.

<sup>8</sup> Smith v. Thorne, 9 Watts (Pa.) 144; Ford v. Nichols, 3 Gratt. (Va.) 88.

<sup>9</sup> Cowles v. Wilcox, 4 Day (Conn.) 108.

plaintiff.<sup>1</sup> But where the defendant executed a release to the witness, he was held competent to testify for or against him.<sup>2</sup>

In Pennsylvania it was held that the maker was competent to prove facts *dehors* the note, showing an agreement for satisfaction of it, tantamount to payment, the rule being that it is the character of the testimony, rather than the relation of the party to the instrument, that governs the question of the admissibility of such a witness; and that if the witness be not involved in the immediate result of the suit, the policy of the law only holds him to silence in regard to acts which might invalidate the paper in its original concoction, or the consideration of the indorsement.<sup>3</sup>

(9) *Parties to, or Holders of, Forged Paper.* The rule was well settled at common law, that in a prosecution for forgery, the person whose name was alleged to have been forged was a competent witness to prove the forgery.<sup>4</sup> He could testify

<sup>1</sup> Chandler v. Morton, 5 Me. 374.

<sup>2</sup> Southard v. Wilson, 21 Me. 494; Commercial Bank v. Whitehead, 4 Ala. 637; Darling v. March, 22 Me. 184; Bird v. Cole, 6 Metc. (Mass.) 326; Bowne v. Hyde, 6 Barb. (N. Y.) 392; Branch Bank v. Coleman, 20 Ala. 140; Kennedy v. Lancaster County Bank, 18 Pa. St. 347.

<sup>3</sup> Work v. Kase, 34 Pa. St. 138. The same court held, in an earlier case, that in an action to recover from a prior indorser the amount advanced to take up a note, the maker was a competent witness to prove that the note was indorsed for the accommodation of the party making the advance. Wright v. Truefitt, 9 Pa. St. 507. As to when the acceptor of an accommodation bill was considered competent to prove the bill an accommodation bill, or to show usury, see Knowles v. Stewart, 2 Cr. C. C. 457; Orr v. Lacey, 2 Dougl. (Mich.) 230. When the payee was admitted to testify to the same matters, see Lyon v. Boilvin, 7 Ill. 629; Newell v. Hatton, 10 Gray (Mass.) 349; Bank of Penn. v. McCalmont, 4 Rawle (Pa.) 307; Robertson v. Stewart, 5 Watts (Pa.) 442. To the contrary, see Finnell v. Cox, 3 Metc. (Ky.) 245; Letson v. Dunham, 2 Gr.

(N. J.) L. 307; Gildersleeve v. Martine, 19 N. Y. 321. As to the competency of the indorser in such cases, see Hall v. Hale, 8 Conn. 336; Greenough v. West, 8 N. H. 400; Bank of Montgomery v. Walker, 9 S. & R. (Pa.) 229; Mitchell v. Conrow, 5 Whart. (Pa.) 572; Barton v. Fetherolf, 39 Pa. St. 279; Jones v. Matthews, 8 Lea (Tenn.) 84; s. c., 41 Am. Rep. 633.

<sup>4</sup> Simmons v. State, 7 Ohio, Pt. I. 116; Pennsylvania v. Farrel, Add. (Pa.) 246; Noble v. People, 1 Ill. 29; Commonwealth v. Hutchinson, 1 Mass. 7; Commonwealth v. Snell, 3 Id. 82; Commonwealth v. Waite, 5 Id. 261; People v. Dean, 6 Cow. (N. Y.) 27; Respublica v. Wright, 1 Yeates (Pa.) 401; Pope v. Nance, 1 Stew. (Ala.) 354; State v. Phelps, 11 Vt. 116; State v. Shurtliff, 18 Me. 368; Commonwealth v. Peck, 1 Metc. (Mass.) 428; State v. Brunson, 1 Root (Conn.) 307; Bacon v. Minor, Id. 258; State v. Blodgett, Id. 534; State v. Whitten, 1 Hill (S. C.) 100. And see White v. Green, 5 Jones (N. C.) L. 47. *Contra*, in an early case in Vermont, under the provisions of a statute disallowing the evidence of the "party aggrieved" in certain prosecutions. State v. A. W., 1 Tyler (Vt.) 260.



in such cases even though a civil action was pending against him, to which the proof of forgery would be a sufficient defence;<sup>1</sup> and the person to whom the forged instrument was passed was also a competent witness;<sup>2</sup> so was the cashier of the bank from which the forged paper purported to have been issued.<sup>3</sup> But the *bona fide* indorser, unless he had paid the note, was excluded.<sup>4</sup>

§ 66. **Non-negotiable Paper, Parties to.**—It was well settled at common law, that in the case of non-negotiable paper, any party to the paper was competent as a witness to prove it void: in such a case there was no *bona fide* purchaser for value and without notice, to be protected.<sup>5</sup> Thus a party to a sealed note was held competent to prove an extension of time to himself, thereby discharging another party, who was a surety, under a plea of payment, and a special plea of the extension.<sup>6</sup> So, also, the assignee of such a note was competent to prove payment to himself,<sup>7</sup> and the maker, to prove payment to the payee,<sup>8</sup> or to testify as to the validity of the consideration of the note.<sup>9</sup> And where there were two joint makers, only one of whom was sued, the other was held competent on being released by the defendant.<sup>10</sup>

§ 67. **Obligor or Obligee.**—(1) *Obligor.* In a comparatively early case in the Supreme Court of the United States it was decided that one of the principals in a bond, released by his co-obligors, is admissible to prove that one of them agreed to sign the bond on condition that another person should also sign it, which was not done.<sup>11</sup> The court limited

<sup>1</sup> Commonwealth v. Peck, 1 Metc. (Mass.) 428. But see State v. Stanton, 1 Ired. (N. C.) L. 424.

<sup>2</sup> State v. Nettleton, 1 Root (Conn.) 308.

<sup>3</sup> Com. v. Read, Thach. (Mass.) Cr. 180.

<sup>4</sup> Republica v. Ross, 2 Yeates (Pa.) 1; s. c., 2 Dall. (U. S.) 239.

<sup>5</sup> Watts v. Smith, 24 Miss. 77; Brown v. Babcock, 3 Mass. 29; Hill v. Payson, Id. 559; Worcester v. Eaton, 11 Id. 368; Loker v. Haynes, Id. 498; Hudson v. Hurlbert, 15 Pick. (Mass.) 423. In an early New York case in the Court of Chancery it was held that one who had transferred such an instrument for a good consid-

eration was competent to impeach it, where he was not interested, or was released, except in cases where a party to negotiable paper was prevented from impeaching it. Topping v. Van Pelt, 1 Hoffm. (N. Y.) 545. Compare Cameron v. Paul, 6 Pa. St. 322.

<sup>6</sup> Miller v. Stem, 2 Pa. St. 286.

<sup>7</sup> Johnson v. Blackman, 11 Conn. 342.

<sup>8</sup> Fitch v. Boardman, 12 Conn. 345. *Contra*, see Corgan v. Frew, 39 Ill. 31.

<sup>9</sup> Fosdick v. Starbuck, 4 Blackf. (Ind.) 417.

<sup>10</sup> Cameron v. Paul, 6 Pa. St. 322.

<sup>11</sup> United States v. Leffler, 11 Pet. (U. S.) 86.

the rule of exclusion to parties to negotiable instruments; and such has been the rule in that court since. So, also, in Kentucky it is held that in an action at law against one of two co-obligors, the other is a competent witness for the obligee;<sup>1</sup> and where an officer was sued for not levying an execution issued upon a replevin bond, an obligor in the bond was held competent to show that it was not acknowledged according to law.<sup>2</sup> So, in an early New York case, a co-obligor, not sued, was permitted to prove the terms on which a joint and several bond had been executed, the suit being commenced against a part only of the obligors.<sup>3</sup> Again, one of several obligors has been held a good witness for the defendant in an action on the bond against a co-obligor.<sup>4</sup> But in Alabama, one of two obligors in a bail bond was not permitted to prove that his co-obligor executed the instrument.<sup>5</sup>

(2) *Obligee*. Where the obligee in a bond assigns it, he is incompetent to defeat the rights of his assignee, by proving payment,<sup>6</sup> or that the consideration was usurious.<sup>7</sup>

§ 68. **Officers.**—The same disqualification by reason of interest in the event applied to public officers, in the like manner as to private individuals. Thus an officer whose fees depended on the contingency of the conviction of one accused was held an incompetent witness on his trial.<sup>8</sup> And even where, by statute, the officer was rendered competent in certain cases, notwithstanding the interest entailed by his office, this did not prevent him from becoming incompetent by the assumption of an interest not imposed by his official position.<sup>9</sup> But it was held in an early Massachusetts case, that where an officer would be liable, as a trespasser, for arresting a prisoner, if arrested wrongfully, the objection to

<sup>1</sup> *Williams v. Cummins*, 6 T. B. North Carolina, see *Ex parte Macay*, Mon. (Ky.) 157; *Long v. Ray*, 1 Dana 84 N. C. 63.  
(Ky.) 430.

<sup>2</sup> *Williams v. Hall*, 2 Dana (Ky.) 97.  
<sup>3</sup> *Canty v. Sumter*, 2 Bay (S. C.) 93; *Stroh v. Hess*, 1 Watts & S. (Pa.) 147.

<sup>4</sup> *Lovett v. Adams*, 3 Wend. (N. Y.) 381.  
<sup>5</sup> *Gilliam v. Clay*, 3 Leigh (Va.) 590; *Wise v. Lamb*, 9 Gratt. (Va.) 294.

<sup>6</sup> *Ligon v. Dunn*, 6 Ired. (N. C.) L. 133; *Ely v. Hager*, 3 Pa. St. 154. To the contrary, *Callaway v. Craig*, 9 Mo. 846.  
But that, in some instances, he may testify in support of the assignee's action on the bond, see *Cox v. Way*, 3 Blackf. (Ind.) 143.

<sup>7</sup> *Whatley v. Johnson*, 1 Stew. (Ala.) 498. See also *Douglass v. Owens*, 5 B. Mon. (Ky.) 47.  
<sup>8</sup> *Bridgeford v. City of Lexington*, 7 B. Mon. (Ky.) 47.

<sup>9</sup> *Bean v. Lane*, 15 Me. 190.

the officer as a witness, on the trial of the prisoner, went only to his credibility, and not to his competency.<sup>1</sup> So, also, the testimony of an officer who had seized liquors kept for sale contrary to law, as to their identity, was held unobjectionable.<sup>2</sup>

<sup>1</sup> *Commonwealth v. Merrill, Thach.* (Mass.) Cr. Cas. 1.

<sup>2</sup> *State v. Bartlett*, 47 Me. 396. See also *Thornton v. Stoddert*, 1 Cr. C. C. 534; *Fiedler v. Smith*, 6 Cush. (Mass.) 336.

An examination of the cases cited below will serve to show to what extent the several classes of public officers were admitted as witnesses, at the common law, notwithstanding the objection of interest:

*Clerks of Courts.* *Elkins v. State*, 13 Ga. 435; *Ballard v. Bancroft*, 31 Ga. 503; *Durham v. Heaton*, 28 Ill. 264; *Taylor v. Commonwealth*, 3 Bibb (Ky.) 356.

*Collectors of taxes and tolls.* *The Treasurer v. Nall*, 1 Tayl. (N. C.) 5; *Smith v. State*, 18 Ohio, 89.

*Commissioners.* *Appeal of Brooks*, 32 Cal. 558; *Smyth v. Bradstreet*, 5 Cow. (N. Y.) 213; *Cannell v. Crawford*, 59 Pa. St. 196; *State v. Davidson*, 1 Bail. (S. C.) 35; *Gordon v. Sims*, 2 McCord (S. C.) Ch. 151.

*Constables and Bailiffs.* *Roberston v. Coker*, 11 Ala. 466; *McGrew v. The Governor*, 19 Ala. 89; *Hosea v. Kinney*, 1 Houst. (Del.) 141; *Stow v. Gregory*, 8 Ill. 575; *Linsee v. State*, 5 Blackf. (Ind.) 601; *Lucas v. Cassady*, 2 Greene (Iowa) 208; *Day v. Hall*, 7 Hals. (N. J.) 203; *Hatch v. Bartle*, 45 Pa. St. 166.

*County treasurers.* *Douglass v. Terrell*, 11 Ala. 583; *Shelly v. Lash*, 14 Minn. 498.

*Judges and Justices.* *Oliver v. State*, 17 Ark. 508; *Justices v. House*, 20 Ga. 323; *Rogers v. Manderville*, Id. 627; *Haven v. Green*, 26 Ill. 252; *Highberger v. Stiffler*, 21 Md. 338; *Taylor v. Larkin*, 12 Mo. 103; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498; *People v. Miller*, 2 Park. (N. Y.) Cr. 197; *Matter of Hcyward*, 1 Sandf. (N. Y.) 701; *McMillen v. Andrews*, 10 Ohio

St. 112; *Truman v. Lore*, 14 Id. 144; *Price v. Gregory*, 4 McCord (S. C.) 261.

*Notaries public.* *Cookendorfer v. Preston*, 4 How. (U. S.) 317; *Johnson v. Harth*, 2 Bail. (S. C.) 183.

*Postmasters.* *Coleman v. Frazier*, 4 Rich. (S. C.) 146.

*Referees.* *Morss v. Morss*, 11 Barb. (N. Y.) 510.

*Registers of land.* *Hall v. Gough*, 1 Har. & J. (Md.) 119.

*School treasurers.* *Marks v. Butler*, 24 Ill. 567.

*Sheriffs.* *McCollum v. Hubbert*, 13 Ala. 282; *Graves v. Merwin*, 19 Conn. 96; *Lambden v. Conoway*, 5 Harr. (Del.) 1; *Hughes v. McClelland*, 4 Ind. 92; *Draper v. Vanhorn*, 15 Ind. 155; *Taylor v. Galland*, 3 Greene (Iowa) 17; *Merrill v. Housley*, 2 Litt. (Ky.) 277; *Kelly v. Lank*, 7 B. Mon. (Ky.) 220; *Bridge v. M'Lane*, 2 Mass. 520; *Crowe v. Peters*, 63 Mo. 429; *Meserve v. Hicks*, 24 N. H. 295; *Reid v. Powell*, 2 Murph. (N. C.) 53; *Meredith v. Shewell*, 1 Pa. 495; *Bowen v. Burk*, 13 Pa. St. 146; *Linton v. Ford*, 46 Id. 294; *Hunter v. Stevenson*, 1 Hill (S. C.) 415; *Shannon v. McMullin*, 25 Gratt. (Va.) 311; *Eaton v. Gentle*, 1 Chand. (Wis.) 10.

*Deputy sheriffs and Jailors.* *State v. Gemmill*, 1 Houst. (Del.) 9; *Glenn v. Black*, 31 Ga. 393; *Ryder v. Buckmaster*, 4 Ill. 196; *Jenney v. Delesdernier*, 20 Me. 183; *Rice v. Wilkins*, 21 Me. 558; *Jewett v. Adams*, 8 Me. 30; *Turner v. Austin*, 16 Mass. 181; *Perkins v. Pitman*, 34 N. H. 261; *Patten v. Halstead*, *Coxe* (N. J.) 277; *Stewart v. Kip*, 5 Johns. (N. Y.) 256; *State v. Simpson*, 1 Jones (N. C.) L. 80; *Junata Bank v. Beale*, 1 Watts & S. (Pa.) 227; *Dorrance v. Com.* 13 Pa. St. 160; *Dean v. Swift*, 11 Vt. 331; *Hopkinson v. Holmes*, 18 Vt. 18; *Allen v. Carty*, 19 Vt. 65; *Ferris v. Smith*, 24

§ 69. **Parent or Child.**—(1) *Parent.* Where, at common law, a conveyance from a father to his son is alleged to be fraudulent, and a suit in chancery is brought for relief, the father is a competent witness for the son, who is a co-defendant.<sup>1</sup> So, also, a father who has assigned a mortgage to his son, in consideration of natural affection, and who intended to charge it as an advancement, if realized, is competent to sustain the mortgage, however his position might affect his credibility.<sup>2</sup> And a father who has settled property upon trustees for the benefit of his married daughter is competent for the trustees in a suit between them and the creditors of the husband who are seeking to subject the property to the payment of the latter's debts.<sup>3</sup> Again, in trespass against a minor son, his father, by whose order the trespass was committed, is competent for the defendant;<sup>4</sup> and so is he where the son is prosecuted criminally.<sup>5</sup> But it has been held that a father, who is heir at law of his son, is not a competent witness for his administrator;<sup>6</sup> and that a grandfather cannot testify for his grandchild.<sup>7</sup>

In North Carolina it was held that there is no rule of law that the fact that a witness stands in the relation of mother to one of the parties naturally gives a bias to her statement so as to affect the accuracy of her recollection; but such relation is a matter for the consideration of the jury alone;<sup>8</sup> and in New York, in an action for damages for causing death "by wrongful act, neglect or default," the mother of the deceased is a competent witness, notwithstanding the fact that she is his sole distributee and next of kin.<sup>9</sup>

Vt. 27; *Brent v. Green*, 6 Leigh (Va.) 16; *Wilson v. Alexander*, 9 Id. 459.

*Surveyors.* *Jones v. Bache*, 3 Wash. C. C. 199; *Bowling v. Helen*, 1 Bibb. (Ky.) 88.

<sup>1</sup> *Mixell v. Lutz*, 34 Ill. 382.

<sup>2</sup> *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435. See also *Stiles v. Hooker*, 7 Cow. (N. Y.) 266.

<sup>3</sup> *O'Neil v. Teague*, 8 Ala. 345.

<sup>4</sup> *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418.

<sup>5</sup> *Cass v. State*, 2 Greene (Iowa) 353.

<sup>6</sup> *Botts v. Fitzpatrick*, 5 B. Mon. (Ky.) 397; *Cushman v. Blakesly*, 3 Greene (Iowa) 542.

<sup>7</sup> *Succession of Hargis*, 3 La. Ann. 142.

<sup>8</sup> *Wiseman v. Cornish*, 8 Jones (N. C.) L. 218.

<sup>9</sup> *Quin v. Moore*, 15 N. Y. 432. As to the competency of the mother of a bastard child in an action for maintenance, or to prove non-access of her husband, see *Bacon v. Harrington*, 5 Pick. (Mass.) 63; *People v. Ontario*, 15 Barb. (N. Y.) 286. That a mother-in-law may testify for the son-in-law, and *vice versa*, see *Groves v. Steel*, 2 La. Ann. 480; *Rachal v. Rachal*, 4 Id. 500; *King v. Neely*, 14 Id. 165. But see *Hall v. Hill*, 6 Id. 745.

(2) *Child.* Independently of statute, the son of one charged with crime has been held competent to testify for his father, though not, it seems, in a prosecution to recover a civil penalty.<sup>1</sup> So in an action by the father for labor and services performed by the son, the latter was held competent for the plaintiff.<sup>2</sup> And where land was held in trust for A for life, with power of appointment to her among her children, her son was held competent for the plaintiff in a suit to recover land sold in violation of the trust.<sup>3</sup>

But the son of an intestate was not admitted to prove that his father did not execute a note, on which it was attempted to charge the estate.<sup>4</sup> And where, in a suit against two, one died pending the suit, his son was held incompetent, even in the absence of a suggestion of the death upon the record.<sup>5</sup>

In Mississippi a daughter was held competent to testify for her mother in a suit between her and a third person, the mother claiming the property in controversy, although her testimony might go to show title in her deceased father to the property.<sup>6</sup> And in an action for entering the plaintiff's house, and debauching his daughter, the daughter was admitted as a witness in a very early case.<sup>7</sup>

Grandchildren were admitted, against the objection of interest, in a suit to set aside a deed executed by their grandfather, for incapacity. The court held their interest to be contingent and not certain.<sup>8</sup> But natural children were rejected in a controversy relating to the succession of the deceased natural father.<sup>9</sup> And so was a son-in-law, in a suit by the executor of the father-in-law, although it did not appear that he was interested.<sup>10</sup>

<sup>1</sup> *State v. Thompson*, 10 La. Ann. 122.

<sup>2</sup> *Keen v. Sprague*, 3 Me. 77. See also *Belt v. Miller*, 4 Har. & M. (Md.) 536.

<sup>3</sup> *Murray v. Finster*, 2 Johns. (N. Y.) Ch. 155. Compare *McClung v. Spotswood*, 19 Ala. 165; *Aiken v. Cato*, 23 Ga. 154; *Mester v. Zimmerman*, 7 Bradw. (Ill.) 156.

<sup>4</sup> *McIntyre v. Middleton*, 1 Sm. & M. (Miss.) Ch. 91.

<sup>5</sup> *Shepard v. Ward*, 8 Wend. (N. Y.) 542. But in New York it is held that the son of a deceased mortgagee is

not a person "for whose immediate benefit" an action by his administrator, to foreclose, is prosecuted, and is therefore a competent witness. *Butler v. Patterson*, 13 N. Y. 292.

<sup>6</sup> *Parker v. McNeill*, 12 Sm. & M. (Miss.) 355.

<sup>7</sup> *Mott v. Goddard*, 1 Root (Conn.) 472.

<sup>8</sup> *Highberger v. Stiffler*, 21 Md. 338.

<sup>9</sup> *Lazare v. Jacques*, 15 La. Ann. 599.

<sup>10</sup> *M'Kinney v. M'Kinney*, 2 Stew. (Ala.) 17.

§ 70. **Partners.**—(1) *In General.* As a general rule, one of two or more co-partners was not permitted to appear as a witness, at common law, either for or against his co-partners, to testify respecting any matter in which the firm, as such, was interested, one reason being that his testimony, if favorable to himself, would necessarily tend to increase the liability of his associates to third persons, or to diminish his own liability to his co-partners. Another reason was that his interest prompted him to shield the firm of which he was a member, and with the other members of which he was jointly liable. Thus one partner could not prove the existence of the partnership,<sup>1</sup> or that a partnership debt had been paid;<sup>2</sup> or that one of the other partners used firm money to pay his individual debts,<sup>3</sup> or that money raised on the individual note of the witness was obtained on the credit of the firm, and was used for its benefit.<sup>4</sup>

But one partner was admitted as a witness for the other in a matter in which they had no joint interest.<sup>5</sup> And another rule was that one who was interested in the profits, but not liable for the losses of the firm, could be a witness for the firm after he had released all his interest in the suit.<sup>6</sup> So, also, a partner who sold partnership property was a competent witness for the purchaser, where the title to the property was brought in question, on being released by him; for the release discharged all the liability of the witness, whether it did that of the co-partner or not.<sup>7</sup>

Where the suit was *instituted by the firm*, one partner could not prove a debt due to the firm;<sup>8</sup> or the value of services rendered by the firm, in an action on a *quantum meruit*;<sup>9</sup> or the amount of damages sustained by the firm by reason of

<sup>1</sup> *Miller v. McClenachan*, 1 Yeates (Pa.) 144; *Spaulding v. Smith*, 10 Me. 363; *Scott v. Bandy*, 2 Head (Tenn.) 197. But see *Rich v. Flanders*, 39 N. H. 304.

<sup>2</sup> *Gardner v. Leraud*, 2 Yeates (Pa.) 185.

<sup>3</sup> *Purviance v. Dryden*, 3 S. & R. (Pa.) 402.

<sup>4</sup> *Foster v. Hall*, 4 Humph. (Tenn.) 346. *S. P. Scott v. Bandy*, *supra*.

<sup>5</sup> *Mooreman v. De Graffenread*, 2 Mill (S. C.) Const. 195; *Ward v.*

*Coulter*, 1 South. (N. J.) 208. See also *Grant v. Shurter*, 1 Wend. (N. Y.) 148; *Sloan v. Bangs*, 11 Rich. (S. C.) 97.

<sup>6</sup> *Curcier v. Pennock*, 14 S. & R. (Pa.) 51.

<sup>7</sup> *Churchill v. Bailey*, 13 Me. 64. See also *Ward v. Chase*, 35 Me. 515; *Thompson v. Franks*, 37 Pa. St. 327.

<sup>8</sup> *Porche v. Le Blanc*, 12 La. Ann. 778.

<sup>9</sup> *Schnader v. Schnader*, 26 Pa. St. 384.

a personal injury inflicted upon one of its members.<sup>1</sup> In all such cases the witness could not remove his interest by his own act, and become competent against the consent of the defendant;<sup>2</sup> but in some cases a release would render the witness competent.<sup>3</sup> Still the co-plaintiff partner, if willing so to do, was deemed competent to testify for the defendant.<sup>4</sup>

Where the suit was *against the firm*, the general rule was that a partner not disqualified on the ground of interest was competent to testify against his co-partners.<sup>5</sup> So held where several were sued jointly as partners, and one of them answered separately, denying that he was a partner, the court admitting his co-defendants as to such defence, as it was not a matter in which they were jointly interested or liable with him.<sup>6</sup> Accordingly, a plaintiff in chancery is entitled to the testimony of one or all of the defendants, sued as partners.<sup>7</sup>

On the other hand, one partner could not, in general, testify in favor of his associate defendants, especially if a judgment might be rendered against the proposed witness,<sup>8</sup> to prove a defence which would be common to both.<sup>9</sup> Thus one partner could not prove payment by the other of a judgment against the firm, since if the defence prevailed, he would no longer be liable to the creditor for the whole amount, but only for one-half, to his co-partner.<sup>10</sup> But when released by all the other members of the firm, he was generally admitted.<sup>11</sup>

<sup>1</sup> Blair v. Milwaukee &c. R. R. Co., 20 Wis. 262.

<sup>2</sup> Loomis v. Loomis, 26 Vt. 198. In such cases the court should hear the evidence and decide on it whether the witness was competent or not. Lyon v. Daniels, 14 Pa. St. 197. See also Thomas v. Brady, 10 Id. 164; Thrall v. Seward, 37 Vt. 573.

<sup>3</sup> White v. Tucker, 9 Iowa, 100; Chapman v. Andrews, 3 Wend. (N. Y.) 240.

<sup>4</sup> Cunningham v. Carpenter, 10 Ala. 109; Moddewell v. Keever, 8 Watts & S. (Pa.) 63; Canon v. Campbell, 18 Pa. St. 164; Young v. Reed, 25 Tex. (Supp.) 113.

<sup>5</sup> Bell v. Thompson, 34 Ill. 529.

<sup>6</sup> Hubbell v. Woolf, 15 Ind. 204. But see Bailey v. Doak, 13 La. Ann.

272, where a contrary doctrine seems to be held. So where defendant is sued as a partner on an obligation not signed by him or with his name, the members of the firm are competent witnesses for him, to prove that he was not a partner. James v. Brooke, 15 La. Ann. 541. But not to prove the converse. Scott v. Bandy, 2 Head (Tenn.) 197.

<sup>7</sup> Williamson v. Haycock, 11 Iowa, 40.

<sup>8</sup> Wilson v. Clark, 27 Miss. 270.

<sup>9</sup> City Bank v. McChesney, 20 N. Y. 240; Ward v. Woodburn, 27 Barb. (N. Y.) 346.

<sup>10</sup> Ellis v. Fisher, 10 La. Ann. 479.

<sup>11</sup> Curtis v. Monteath, 1 Hill (N. Y.) 356; Jackson v. Jones, 13 Ala. 121.

In a dispute *between partners*, it has been held that one of the firm is competent to prove claims of other members who call him as a witness, but not to diminish claims set up against the firm by partners who did not so call him;<sup>1</sup> or where the effect of a judgment in favor of those calling him would be to discharge a claim for which he remains jointly liable.<sup>2</sup> For the same reason where it was claimed that a firm was liable for the board of one of the partners, another partner was held incompetent to prove that fact.<sup>3</sup>

(2) *Partner not sued.* As a general rule, the fact that the proposed witness, though a partner with the other defendants, was not made a party to the suit, did not remove his incompetency, for it was his interest in the event, not his position as a party to the controversy, which disqualified him. When not sued, his liability to his co-partner for contribution, in the event of a recovery by the plaintiff, caused his exclusion.<sup>4</sup> It was even held that a release by the defendant of record (his partner) would not render the witness competent for him, his liability to the plaintiff still subsisting.<sup>5</sup> The same rule was applied where both partners were sued but one only was served with process and the one not served did not appear.<sup>6</sup> So, also, the proposed witness was not permitted to testify for the plaintiff, to prove that the defendant was a partner of the witness, and thus jointly liable with him for the debt sued on.<sup>7</sup>

On the other hand, it was held in some jurisdictions that he could, as a witness for the plaintiff, prove the cause of

<sup>1</sup> *Garner v. Beatty*, 7 J. J. Marsh. (Ky.) 223. *S. P. Cinnamon v. Greenlee*, 10 Mo. 578.

<sup>2</sup> *Kapp v. Barthan*, 1 E. D. Smith (N. Y.) 622. See also *Meason v. Kanc*, 63 Pa. St. 335.

<sup>3</sup> *Street v. Meadows*, 11 Ired. (N. C.) L. 130.

<sup>4</sup> *Cochran v. Cunningham*, 16 Ala. 448; *Myers v. Gilbert*, 18 Ala. 467; *Bill v. Porter*, 9 Conn. 23; *Hooker v. Johnson*, 8 Fla. 453; *Hurd v. Brown*, 25 Ill. 616; *Randolph v. Govan*, 14 Sm. & M. (Miss.) 9; *Ransom v. Keyes*, 9 Cow. (N. Y.) 128; *Porter v. Wilson*, 13 Pa. St. 641. *Contra*, see *Weston v. Hunt*, 19 Mo. 505; *Cummins v. Coffin*, 7 Ired. (N. C.) L. 193.

<sup>5</sup> *Tomkins v. Beers*, 2 Root (Conn.) 498; *Cline v. Little*, 5 Blackf. (Ind.) 486; *Black v. Marvin*, 2 Pa. 138; *Scott v. Wakins*, 2 Sm. & M. (Miss.) 255; *Wells v. Pack*, 23 Pa. St. 155. To the contrary, *Lefferts v. De Mott*, 21 Wend. (N. Y.) 136; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

<sup>6</sup> *Wright v. Boynton*, 37 N. H. 9; *Latham v. Kenniston*, 13 N. H. 203; *Taylor v. Henderson*, 17 S. & R. (Pa.) 453; *Little v. Clarke*, 36 Pa. St. 114.

<sup>7</sup> *Dixon v. Hood*, 7 Mo. 414; *McIlvaine v. Franklin*, 2 La. Ann. 622; *Ellis v. Lauve*, 4 Id. 246; *Lewis v. Post*, 1 Ala. 65; *Barney v. Earle*, 20 Ala. 405; *Garner v. Myrick*, 30 Miss. 448; *Phillips v. Henry*, 2 Head (Tenn.) 133.



action against the partner sued;<sup>1</sup> and that he was competent for his co-partner, when required to testify against his interest, to matters within the scope of the issue;<sup>2</sup> or where his interest was equally balanced between the parties to the suit.<sup>3</sup>

(3) *Dormant Partner.* In Pennsylvania it was held that a dormant partner, though not a party to a suit, cannot be a witness for the partnership.<sup>4</sup> But in an early New York case it was decided that if a dormant partner releases his interest to his co-partner, he may be a competent witness for him.<sup>5</sup>

(4) *Effect of Judgment by Default, Discontinuance, etc.* As to the competency of one sued as a partner and defaulted, the cases are not harmonious, many of them holding that a witness so situated is still disqualified by interest from being a witness, as against his co-defendants,<sup>6</sup> even to prove the partnership;<sup>7</sup> or, in favor of his co-defendant, to prove that the latter was not a partner;<sup>8</sup> while others, of equal respectability, take the contrary view, admitting a witness so situated to testify in favor of his co-partner;<sup>9</sup> or against him and in favor of the plaintiff.<sup>10</sup> Thus a defaulted partner was allowed to prove that the bill sued on was made by him in the name of two members of the firm, and indorsed by a third, to raise money for the benefit of the firm, and that the money so raised was so used and applied.<sup>11</sup>

(5) *Assignment of Interest.* In an early New York case it was decided that one partner, who had sold his interest in the firm to a co-partner, and had been released by the other

<sup>1</sup> Crook v. Taylor, 12 Ill. 353; 359; Fairchild v. Armsbaugh, 22 Cal. Washing v. Wright, 8 Ired. (N. C.) 572.  
L. I.

<sup>2</sup> Anderson v. Snow, 8 Ala. 504; Robertson v. Mills, 2 Har. & G. (Md.) 98. And see Cutter v. Fanning, 2 Iowa, 580.

<sup>3</sup> Black v. Campbell, 6 W. Va. 51.

<sup>4</sup> Wood v. Connell, 2 Whart. (Pa.) 542.

<sup>5</sup> Clarkson v. Carter, 3 Cow. (N. Y.) 84.

<sup>6</sup> Nightingale v. Scannel, 6 Cal. 506; Cody v. Cody, 31 Ga. 619; Rich v. Husson, 4 Sandf. (N. Y.) 115.

<sup>7</sup> Alexander v. Crosthwaite, 44 Ill.

<sup>8</sup> Williams v. Soutter, 7 Iowa, 435. Contra, Aicardi v. Strang, 38 Ala. 326; Gooden v. Morrow, 8 Ala. 486; Smith v. Knight, 71 Ill. 148; Thomas v. Mohler, 25 Md. 36; Long v. Story, 13 Mo. 4.

<sup>9</sup> Sharp v. Morrow, 6 T. B. Mon. (Ky.) 300; Butcher v. Forman, 6 Hill (N. Y.) 583.

<sup>10</sup> Robinson v. McFaul, 19 Mo. 549. Contra, Glasscock v. McRae, 6 La. Ann. 284.

<sup>11</sup> Bacon v. Hutchings, 5 Bush (Ky.) 595.

members of the firm, was a competent witness for the plaintiff in a suit to recover a debt due the firm before the witness retired.<sup>1</sup>

But the Supreme Court of Louisiana said that the testimony of a witness so situated must always be received with grave suspicions.<sup>2</sup> And the more prevalent and sounder doctrine was, that a partner can never be so far divested of his interest in the partnership, by any act of himself and co-partners, as to be a competent witness in a matter relating to the partnership while he was a member.<sup>3</sup>

(6) *After Dissolution.* As a general rule, the dissolution of the partnership did not remove the common-law incompetency of the several partners to testify as to transactions of the firm prior to dissolution, *e.g.* to prove that the firm was not dissolved at a particular time;<sup>4</sup> or even as to matters occurring since the dissolution, where the testimony of the witness would tend to increase the liability of a former partner, either to creditors or for contribution.<sup>5</sup>

In an action against the administrator of a deceased partner, to recover a partnership debt, the surviving partner was held a competent witness.<sup>6</sup> In such an action the surviving partner may prove the partnership.<sup>7</sup> But where the surviving partner sues, as such, the widow of the deceased partner cannot testify for him, her interest being to increase the fund in which she is entitled to a distributive share.<sup>8</sup>

§ 71. **Part-Owners.**—At common law, one joint owner of personal property was, from interest, incompetent to testify for the other where the title to such property was in issue;<sup>9</sup>

<sup>1</sup> *Hosack v. Rogers*, 25 Wend. (N. Y.) 313.

<sup>2</sup> *McLaughlin v. Sauv *, 13 La. Ann. 99.

<sup>3</sup> *Collins v. Flowers*, 2 Miss. 26; *Cravens v. Dewey*, 13 Cal. 40; *Dougherty v. Smith*, 4 Metc. (Ky.) 279; *Church v. Hampton*, 6 Watts & S. (Pa.) 514.

<sup>4</sup> *Crymes v. White*, 37 Ala. 549; *s. c.*, Ala. Sel. Cas. 473.

<sup>5</sup> *Merrit v. Pollys*, 16 B. Mon. (Ky.) 355. See also *White v. Jones*, 14 La. Ann. 681; *Hale v. Wetmore*, 4 Ohio St. 600.

In *Morse v. Green* (13 N. H. 32) a debtor of the firm at its dissolution

settled the debt by giving his notes to the two partners separately, each for a part of the debt. In an action on one of the notes against the maker, it was held that the other partner was a competent witness for the plaintiff. See also *Whitehead v. Bank of Pittsburgh*, 2 Watts & S. (Pa.) 172, *White v. Tudor*, 24 Tex. 639.

<sup>6</sup> *Brewster v. Sterrett*, 32 Pa. St. 115; *Collier v. Leach*, 29 Id. 404. *S. P. Wright v. Funck*, 94 Pa. St. 26.

<sup>7</sup> *Grant v. Shutter*, 1 Wend. (N. Y.) 148.

<sup>8</sup> *Allan v. Blanchard*, 9 Cow. (N. Y.) 631.

<sup>9</sup> *Caldwell v. Cole*, 13 Me. 120.

or against the other, to prove the fact of joint ownership and consequent joint liability.<sup>1</sup> But this rule had some seeming exceptions: thus in an action on a marine policy, one of the part-owners of the vessel, not interested in the insurance, was admitted to prove the loss and other facts.<sup>2</sup> So, also, a part-owner of a cargo, standing by and permitting another, who owned the residue, to sell the same, agreeing to look to such other for payment, and subsequently being paid for the same, was held competent to prove the contract of sale.<sup>3</sup>

§ 72. **Personal Representatives.** — (1) *In General.* It was well settled at common law, in some States, that the testimony of an executor, administrator, or guardian was inadmissible in an action against or in favor of the estate he represented; his being a party, and liable eventually to costs, having always been deemed a sufficient objection.<sup>4</sup> But the action being between third parties, he was generally admitted for many purposes, such as to protect the title of one who had purchased or hired a chattel from him in his representative capacity;<sup>5</sup> or to whom he had paid over a promissory note payable to the testator;<sup>6</sup> or to support the validity of a claim against the estate which he had voluntarily paid, in a contest between the claimant and another creditor;<sup>7</sup> or to prove that a conveyance made by the intestate, absolute on its face, was only intended to create a trust;<sup>8</sup> or, the dispute being between a guardian and his ward, to show when, and how much money the witness paid over to the guardian.<sup>9</sup>

<sup>1</sup> *Aston v. Jemison*, 17 Ala. 61 (a statutory action to charge the defendant as joint owner, with the witness, of a steamboat). In another case the witness was not allowed to testify for the other joint owner of the steamboat. *The Farmer v. McCraw*, 31 Ala. 659. See also *Marquand v. Webb*, 16 Johns. (N. Y.) 89; *Lufkin v. Patterson*, 38 Me. 282. The contrary doctrine is held as to actions *ex delicto*, in *Lee v. Murray*, 12 Mo. 280.

<sup>2</sup> *Ruan v. Gardner*, 1 Wash. (U.S.) 145.

<sup>3</sup> *Outwater v. Dodge*, 6 Wend. (N. Y.) 397. *S. P. The Osceola, Olc. Adm.* 450; *West v. The Berlin*, 3 Iowa, 532. See also *Macy v. DeWolf*, 3 Woodb. & M. (U.S.) 193; *Clement v. Durgin*, 5 Me. 9. As to the competency of tenants in common, see *Rogers v. Mabe*, 4 Dev. (N. C.) 180;

*Darlington's Appropriation*, 13 Pa. St. 430.

<sup>4</sup> *Sears v. Dillingham*, 12 Mass. 358; *Fox v. Whitney*, 16 Id. 118; *Fenwick v. Forrest*, 6 Har. & J. (Md.) 415; *Vansant v. Boileau*, 1 Binn. (Pa.) 444; *Beard v. Cowman*, 3 Har. & M. (Md.) 152; *McIntyre v. Middleton*, 1 Sm. & M. (Miss.) Ch. 91; *Bellamy v. Cains*, 3 Rich. (S. C.) 354. But see *Parker v. Moore*, 2 La. Ann. 1017.

<sup>5</sup> *Walden v. Smith*, 29 Ala. 417.

<sup>6</sup> *Lock v. Noyes*, 9 N. H. 430.

<sup>7</sup> *Christman v. Siegfried*, 5 Watts. & S. (Pa.) 400.

<sup>8</sup> *Miller v. Thatcher*, 9 Tex. 482.

<sup>9</sup> *Clark v. Burnside*, 15 Ill. 62; *Hooper v. Royster*, 1 Munf. (Va.) 119; *Young v. Warne*, 2 Rob. (Va.) 420. But see *Raymond v. Simonson*, 4 Blackf. (Ind.) 77.

Again, an administrator was admitted to prove the existence, loss, and contents of a bond for title, given by his intestate in his lifetime, though he had executed a deed, with warranty, to the purchaser, in accordance with the bond.<sup>1</sup> And a conveyance by the representative himself, in the absence of fraud or warranty, did not render him incompetent to testify in a case where the title to the land came in question.<sup>2</sup>

(2) *Competency of Executor to sustain the Will.* In a comparatively early case it was held that an executor, having no other interest than his fiduciary character imparts to him, is a competent witness to prove the will,<sup>3</sup> his remuneration for his services and expenses not depending upon the establishment of the will.<sup>4</sup> In several cases he was held competent to sustain the will, although he was the principal legatee and devisee;<sup>5</sup> but the weight of authority was decidedly the other way.<sup>6</sup> Thus it was held that an executor could not prove the testator's sanity;<sup>7</sup> or the circumstances under which the will was found.<sup>8</sup> Having paid a legacy, his interest disqualified him on an issue of *devisavit vel non*.<sup>9</sup> In another case the executor was not allowed to prove the will, though he had deposited money to pay the costs, because, the will being proved, he would be entitled to have his deposit back again.<sup>10</sup> A resignation or renunciation of the trust, however, rendered the person named in the will, as executor, competent to prove it.<sup>11</sup>

<sup>1</sup> Moore v. Maxwell, 18 Ark. 469.

<sup>2</sup> Burroughs v. Thorne, 2 South (N. J.) 777; Krause v. Reigel, 2 Whart. (Pa.) 385. Or even if with warranty, the witness being first released. Moody v. Fulmer, 3 Grant (Pa.) Cas. 17. See also Kifer v. Brennehan, 1 Pa. St. 452; Kinzer v. Mitchell, 8 Pa. St. 64.

<sup>3</sup> M'Daniel's will, 2 J. J. Marsh. (Ky.) 331.

<sup>4</sup> Comstock v. Hadlyme, 8 Conn. 254. S. P. Coalter v. Bryan, 1 Gratt. (Va.) 18; Lecky v. Cunningham, 56 Pa. St. 370.

<sup>5</sup> Kelley v. Miller, 39 Miss. 17; Mil- lay v. Wiley, 46 Me. 230; McKeen v. Frost, Id. 239.

<sup>6</sup> Sutton v. Sutton, 5 Harr. (Del.) 459; M'Daniel's will, *supra*; Comstock v. Hadlyme, *supra*.

<sup>7</sup> Hayden v. Loomis, 2 Root (Conn.) 350.

<sup>8</sup> Sutton v. Sutton, *supra*; but in this case the executor was largely interested in a codicil.

<sup>9</sup> Hinkle v. Eichleberger, 2 Pa. St. 483; Barbee v. Mason, 5 Coldw. (Tenn.) 108. Other cases hold him incompetent, generally, on such an issue. Vinyard v. Brown, 4 McCord (S. C.) 24. But see Arnett v. Weeks, 8 Humph. (Tenn.) 547; or in a suit to establish a nuncupative will. Watts v. Holland, 56 Tex. 54.

<sup>10</sup> Adams v. Sandige, 29 Ga. 563.

<sup>11</sup> Blakey v. Blakey, 33 Ala. 611; Burritt v. Silliman, 13 N. Y. 93; s. c., 16 Barb. 198. Compare McDonough v. Loughlin, 29 Barb. (N. Y.) 238. And see Subdivision (6), *infra*, p. 112.

(3) *Actions in Behalf of the Estate.* In New Hampshire, an administrator having no interest was held a competent witness in a suit brought by him on a contract, in the name of the party thereto, and for the benefit of the estate;<sup>1</sup> but in Texas the contrary was held even where the witness had filed a release of all claims against the estate for commissions.<sup>2</sup> In New York the witness was admitted in an action brought by him for damages for causing the death of his intestate;<sup>3</sup> and in Pennsylvania the administrator plaintiff was permitted to prove that he kept certain books of the intestate as his clerk.<sup>4</sup> So, also, in Iowa, he was permitted to testify in an action to recover possession of property belonging to the intestate.<sup>5</sup>

(4) *Actions against the Representative, as such, or individually.* In a suit against himself, the testimony of the personal representative of a deceased person was generally excluded.<sup>6</sup> Thus he was not permitted to prove that at a given time he had funds in his hands sufficient to pay all the claims of creditors, for the purpose of enabling the distributees of the estate to testify, without a release from them;<sup>7</sup> and he was also rejected on the trial of a bill in equity by the widow, for dower, against the heirs and executors.<sup>8</sup> So, also, he was not allowed to prove failure of consideration of a draft drawn by his intestate;<sup>9</sup> or to testify in a suit on a bill or note indorsed by himself as executor, for in such case he is personally bound.<sup>10</sup> Nor could he testify in favor of his co-defendants, the other executors,<sup>11</sup> or to discharge the land of a devisee, who was a co-defendant, from the decedent's debts.<sup>12</sup> And it has been held that being sued as executor, he was not a competent witness for the estate, though he was a bankrupt, and had obtained his discharge as such.<sup>13</sup>

<sup>1</sup> *Barker v. Barker*, 16 N. H. 333. The commission allowed him not constituting a disqualifying interest. *Smith v. Lambeth*, 15 La. Ann. 566.

<sup>2</sup> *Dial v. Crain*, 10 Tex. 444. Compare *Myers v. Walker*, 31 Ill. 353.

<sup>3</sup> *Sandford v. Eighth Ave. R. R. Co.*, 7 Bosw. (N. Y.) 122.

<sup>4</sup> *Craig v. Patton*, 3 S. & R. (Pa.) 300.

<sup>5</sup> *Bradley v. Kavanagh*, 12 Iowa, 273.

<sup>6</sup> *Grimes v. Booth*, 19 Ark. 224; *Lampton v. Lampton*, 6 T. B. Mon. (Ky.) 616.

<sup>7</sup> *Hall v. Alexander*, 9 Ala. 219.

<sup>8</sup> *Price v. Notrebe*, 17 Ark. 45.

<sup>9</sup> *Shannon v. Fuller*, 20 Ga. 566. S. P. *Thom v. Wilson*, 24 Ind. 323.

<sup>10</sup> *Leverich v. Bossier*, 12 La. Ann. 583.

<sup>11</sup> *Fort v. Gooding*, 9 Barb. (N. Y.) 371.

<sup>12</sup> *Hunt v. Moore*, 2 Pa. St. 105. Compare *Lupton v. Lupton*, 2 Johns. (N. Y.) Ch. 614.

<sup>13</sup> *Osborn v. Black, Spears* (S. C.) Eq. 431.

On the other hand, the representative has been admitted as a witness to testify as to facts occurring after the death of the deceased, in a proceeding in a court of probate, to establish a claim against the estate;<sup>1</sup> and to prove that a debt alleged to be owing by the estate had been paid by the deceased, he having no personal interest in the case.<sup>2</sup> And he was held competent in an action against himself for embezzling, and failing to inventory notes given to him by the deceased.<sup>3</sup>

(5) *On the Accounting.* In the absence of an enabling statute, personal representatives, being *prima facie* liable for the entire personalty of the decedent, if they are *in fact* liable for any considerable portion thereof, are incompetent to testify in favor of their own interests.<sup>4</sup> But they may show their acts, and the state of their accounts since the administration, not however for the purpose of proving any debt due to themselves from the intestate.<sup>5</sup> In Maryland it is held that in a proceeding to discover assets and to compel an executor to account for such as had come into his hands, he is competent to show that he had advanced money to the testator;<sup>6</sup> and being called by an exceptant to his account to prove its incorrectness, he may go on and testify in his own behalf that it is correct.<sup>7</sup>

(6) *Former Representative.* The authorities, even at common law, are quite harmonious in conceding the competency of an executor or administrator who has resigned,<sup>8</sup> or been removed or superseded,<sup>9</sup> to testify in favor of his successor in the trust, and this, even though proceedings are pending to reverse the action of the court removing him.<sup>10</sup> So is he competent in such a case for his former co-executor.<sup>11</sup> He is no longer a party, nor liable for the costs.<sup>12</sup> In one case

<sup>1</sup> Terhune v. Henry, 13 Iowa, 99.

<sup>7</sup> Crowder v. Shackelford, 35 Miss.

<sup>2</sup> De Kerlegand v. Robin, 1 La. Ann. 227.

321.

<sup>3</sup> Stewart v. Glenn, 58 Mo. 481. And see also Capehart v. Huey, 1 Hill (S. C.) Ch. 405.

<sup>8</sup> McLaughlin v. Nelms, 9 Ala. 925.

<sup>4</sup> Willcox v. Smith, 26 Barb. (N. Y.) 316; Ela v. Edward, 97 Mass. 318.

<sup>9</sup> Farrow v. Bragg, 30 Ala. 261; Walker v. Mock, 39 Ala. 508; Anderson v. Irvine, 7 B. Mon. (Ky.) 209. Wiggins v. Plumer, 31 N. H. 251; Burd v. M'Gregor, 2 Grant (Pa.) Cas. 353.

<sup>5</sup> Finch v. Creech, 55 Ga. 124.

<sup>10</sup> Saunders v. Duval, 19 Tex. 467.

<sup>6</sup> Cooke v. Cooke, 29 Md. 538. S. P. Bolton v. Smead, 38 Barb. (N. Y.) 141.

<sup>11</sup> Burkholder v. Lapp, 31 Pa. St. 322.

<sup>12</sup> Wiggins v. Plumer, *supra*.

it is held that he is competent to testify *against* his successor in the trust.<sup>1</sup>

§ 73. **Principal or Agent.** — (1) *Principal.* The principal was not generally admitted as a witness in an action involving the acts of his agent.<sup>2</sup> Thus he was not permitted to support his own title to property sought to be replevied from his agent,<sup>3</sup> or to testify in an action by a county treasurer, against the agent, for non-payment of the principal's taxes,<sup>4</sup> or in the agent's suit against an attorney, for the recovery of a debt due the principal, which the agent had placed in the attorney's hands for collection, as the record would be evidence for the principal, of the amount recovered, in a suit by him against the agent.<sup>5</sup>

But where an agent was sued for money had and received on account of the principal, the theory of the suit being that there was nothing due the principal, the latter was held a competent witness;<sup>6</sup> and in a suit against the master of a vessel for negligently colliding with plaintiff's vessel, the owner of the vessel commanded by the defendant was admitted to testify.<sup>7</sup> So, also, after his interest was released, a principal was allowed to prove what his object was in sending an agent from one place to another.<sup>8</sup>

(2) *Agent.* The most important exception to the common-law rule excluding, as witnesses, parties interested in the event, was the case of an agent. He was constantly permitted to testify even though he was apparently interested.<sup>9</sup> He could prove the fact of his own agency,<sup>10</sup> or its nature,

<sup>1</sup> *McLaughlin v. Nelms*, 9 Ala. 925.

<sup>2</sup> *Steward v. Richardson*, 2 Yeates (Pa.) 89.

<sup>3</sup> *Russell v. McKenzie*, 13 Md. 560; *Sherman v. Bruce*, 37 Ill. 39.

<sup>4</sup> *Hayes v. Grier*, 4 Bin. (Pa.) 81.

<sup>5</sup> *Wallace v. Peck*, 12 Ala. 768.

<sup>6</sup> *Seidell v. Peckworth*, 10 S. & R. (Pa.) 442.

<sup>7</sup> *Case v. Reeve*, 14 Johns. (N. Y.) 79.

<sup>8</sup> *Kirksey v. Bates*, 1 Ala. 303.

<sup>9</sup> *Bean v. Pearsall*, 12 Ala. 592; *Collins v. Lester*, 16 Ga. 410; *State v. Holloway*, 8 Blackf. (Ind.) 45; *Phillips v. Bridge*, 11 Mass. 242; *Fisher v. Wil-*

*lard*, 13 Id. 379; *Rice v. Gove*, 22 Pick. (Mass.) 158; *Ward v. Griffin*, 3 Ired. (N. C.) Eq. 150; *Sales v. Cay*, 12 Rich. (S. C.) L. 558.

<sup>10</sup> *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 333; *Napier v. Barry*, 24 Ala. 511; *Manaway v. State*, 44 Ala. 375; *Croom v. Noll*, 6 Fla. 52; *Dean v. Young*, 13 Sm. & M. (Miss.) 118; *Kent v. Tyson*, 20 N. H. 121; *Downer v. Button*, 26 N. H. 338; *Miller v. Hayman*, 1 Yeates (Pa.) 23; *McGunnagle v. Thornton*, 10 S. & R. (Pa.) 251; *Piercy v. Hedrick*, 2 W. Va. 458. *S. P. Cadwell v. Meek*, 17 Ill. 220; *Collins v. Smith*, 18 Ill. 160.

and also his acts as agent.<sup>1</sup> His admission to testify arose from public expediency and necessity; for without his testimony, matters of daily and ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained.<sup>2</sup> He was usually admitted on general principles, and for all purposes,<sup>3</sup> to prove any fact in the case.<sup>4</sup> Thus, where a writing was executed by an agent, he was deemed competent to prove it, even though a subscribing witness were within reach of process;<sup>5</sup> so he could prove his own declarations made at the time the contract was made, in order to uphold the contract as against the charge of fraud.<sup>6</sup> Again, testifying against his principal, he could deny the relation of agency.<sup>7</sup>

If the agency was created by a writing which was lost or destroyed, the agent could prove its contents.<sup>8</sup> So, also, he could testify that business done in his own name was the business of his principal;<sup>9</sup> and he was a competent witness in a suit commenced by his directions, where he had not assumed any personal responsibility for the costs of the prosecution.<sup>10</sup> He could prove the loss of an instrument, parol or under seal, though given to himself;<sup>11</sup> or explain a receipt given by him, though the effect of his evidence was to limit its terms,<sup>12</sup> or prove that he had paid over money left with him by his principal for that purpose.<sup>13</sup> Having negotiated a trade for

<sup>1</sup> *Pendall v. Rench*, 4 McLean (U. S.) 259; *Chapin v. Siger*, Id. 378; *Gayle v. Bishop*, 14 Ala. 552; *Scott v. Jester*, 13 Ark. 437; *Tomlinson v. Spencer*, 5 Cal. 291; *Weaver v. Bracken*, 18 B. Mon. (Ky.) 723; *Phelps v. Hodge*, 6 La. Ann. 525; *Barrier v. Peychand*, 14 Id. 370; *Crooker v. Appleton*, 25 Me. 131; *Perkins v. Jordan*, 35 Me. 23; *Caldwell v. Wentworth*, 16 N. H. 318; *Covington v. Bussey*, 4 McCord, (S. C.) 412; *Black v. Goodman*, 1 Bailey (S. C.) 201; *Harvey v. Sweasy*, 4 Humph. (Tenn.) 449.

<sup>2</sup> 1 Greenl. Ev. (14 ed.) § 416; *Wainwright v. Straw*, 15 Vt. 215; *Stringfellow v. Marriott*, 1 Ala. 573; *Mills v. Beard*, 19 Cal. 158; *Stothard v. Aull*, 7 Mo. 318; *Doe v. Himelick*, 4 Blackf. (Ind.) 494. But see *Runyon v. Farmers &c. Bank*, 3 Gr. (N. J.) Eq. 480.

<sup>3</sup> *Nicholls v. Guibor*, 20 Ill. 285.

<sup>4</sup> *Connolly v. Childs*, 2 A. K. Marsh. (Ky.) 242.

<sup>5</sup> *Falls v. Gaither*, 9 Port. (Ala.) 605.

<sup>6</sup> *Harrison v. Tulane*, 3 Ala. 534.

<sup>7</sup> *McFarland v. Lowry*, 40 Iowa, 467.

<sup>8</sup> *Kirkpatrick v. Cisma*, 3 Bibb (Ky.) 244. But see *Nicholson v. Miffin*, 2 Dall. (U. S.) 246; *Kennebeck Purchase v. Call*, 1 Mass. 483. See also *Caldwell v. Wentworth*, 16 N. H. 318.

<sup>9</sup> *Ames v. St. Paul &c. R. R. Co.*, 12 Minn. 413.

<sup>10</sup> *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Kerr v. Cottor*, 23 Tex.

411.

<sup>11</sup> *Grayson v. Bannon*, 8 Watts (Pa.) 524.

<sup>12</sup> *Giddings v. Munson*, 4 Vt. 308.

<sup>13</sup> *The Governor v. Gee*, 19 Ala. 199. But see *Eastman v. Hodges*, 1 D. Chip. (Vt.) 101; *Montgomery v. Evans*, 8 Ga. 178.



his principal, he could testify as to his understanding of the contract, for that is the understanding of the principal; but not as to the understanding of the other party, for that is opinion, and a fact for the jury.<sup>1</sup> And his competency to testify as to contracts made by him as agent, applied to written equally with oral contracts.<sup>2</sup>

On the other hand, where the agent exceeded his authority, and in so doing committed a tort, he was deemed incompetent to testify for the principal when the latter was sued for such tort;<sup>3</sup> and even where the action was on contract, an agent who had become directly interested in the transaction in which he acted as agent was excluded as a witness;<sup>4</sup> but in such cases, a *prima facie* case of the agent's liability over to the principal ought first to be made out in support of his incompetency as a witness, and then the principal had the right to examine him on his *voir dire*, in order that he might explain his situation.<sup>5</sup> So, also, where the right of action turned upon the question whether an agent had been guilty of negligence or other breach of duty, the agent was incompetent to testify for the defendant.<sup>6</sup>

In applying these principles it was held that where an agent lost his principal's money at gaming, and the latter sued the winner to recover it, the agent was not a competent witness without a release.<sup>7</sup> So, also, an agent who signed an attachment,<sup>8</sup> or a bill of sale,<sup>9</sup> or a replevin bond,<sup>10</sup> in the name of his principal, was held incompetent to testify in favor of his principal, on the ground of interest from liability over to the principal, unless released by him.<sup>11</sup>

<sup>1</sup> Linsley v. Lovely, 26 Vt. 123.

<sup>2</sup> Lytle v. Bond, 40 Vt. 618.

<sup>3</sup> Railroad Co. v. Kidd, 7 Dana (Ky.) 245. Compare Crooker v. Appleton, 25 Me. 131.

<sup>4</sup> Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248; Peckham v. Lyon, 4 McLean (U. S.) 45. S. P. Christy v. Smith, 23 Vt. 663.

<sup>5</sup> Ashe v. Murchison, 8 Ired. (N. C.) L. 215.

<sup>6</sup> McClure v. Whitesides, 2 Ind. 573; Finn v. Vallejo & c., 7 Cal. 253; Middekauff v. Smith, 1 Md. 329; Struthers v. Kendall, 41 Pa. St. 214; Gas Light Co. v. City Council, 9 Rich.

(S. C.) 342; Ware v. Bennett, 18 Tex. 794.

<sup>7</sup> Allen v. Lacy, Dud. (Ga.) 81; Jones v. McRay, 6 Jones (N. C.) L. 192.

<sup>8</sup> Lankford v. Keith, 21 Ala. 342.

<sup>9</sup> Knapp v. Sacket, 1 Root (Conn.) 501.

<sup>10</sup> Ward v. Bradwell, 1 New Mex. 75.

<sup>11</sup> For further illustration of the application of the foregoing principles to the various classes of agents, the reader is referred to the cases collected below:—

*Agent signing bill or note.* Childress v. Miller, 4 Ala. 447; Barney v. Earle,

§ 74. **Principal or Surety.**<sup>1</sup>—(1) *Principal*. It was well settled at common law that the principal obligor in a bond was not a competent witness for the surety, in an action on the bond,<sup>2</sup> unless something appeared constituting the case an exception to the general rule making the principal liable

20 Ala. 405; *Thurston v. Mauro*, 1 Greene (Iowa) 231; *Britton v. Andrews*, 1 La. Ann. 398; *Garland v. Scott*, 15 Id. 143; *John v. McConnell*, 19 Mo. 38; *Shiras v. Morris*, 8 Cow. (N. Y.) 60; *McKee v. Myers*, Add. (Pa.) 31.

*Agent to purchase.* *Bush v. Magee*, 4 Ala. 710; *Ortez v. Jewett*, 23 Ala. 662; *Moore v. Lea*, 32 Ala. 375; *McLeod v. Frost*, 7 La. Ann. 50; *Townley v. Wooley, Cox* (N. J.) 377; *Ayres v. Van Lien*, 2 South. (N. J.) 765; *Burlingham v. Deyer*, 2 Johns. (N. Y.) 189; *Sewall v. Fitch*, 8 Cow. (N. Y.) 215; *Sage v. Sherman*, 25 Wend. (N. Y.) 426; *Murray v. Carrett*, 3 Call (Va.) 373; *Blair v. Owles*, 1 Munf. (Va.) 38.

*Agent to sell.* *Griggs v. Woodruff*, 14 Ala. 9; *Shepard v. Palmer*, 6 Conn. 95; *Swearingen v. Fields*, 1 Dana (Ky.) 387; *Earle v. Clark*, 15 Me. 368; *New York Slate Co. v. Osgood*, 11 Mass. 60; *Towle v. Leavitt*, 23 N. H. 360; *Harwood v. Murphy*, 4 Halst. (N. J.) 215; *Hickling v. Fitch*, 1 Miles (Pa.) 208; *Scott v. Wells*, 6 Watts & S. (Pa.) 357; *Lipscomb v. Kitrell*, 11 Humph. (Tenn.) 256; *Spencer v. Barnum*, 4 Vt. 298. See also *Bailey v. Ogden*, 3 Johns. (N. Y.) 399.

*Attorney in fact.* *Phelps v. Riley*, 3 Conn. 266; *Head v. Bogue*, 22 Ill. 117.

*Bank clerk.* *Young v. First Nat. Bank*, 51 Ill. 73; *Union Bank v. Meeker*, 4 La. Ann. 189; *Strafford Bank v. Cornell*, 1 N. H. 193; *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Hess v. State*, 5 Ohio, 5. See also *Franklin Bank v. Freeman*, 16 Pick. (Mass.) 537.

*Brokers.* *Livingston v. Swannick*, 2 Dall. (U. S.) 300; *Shaw v. Davis*, 5 Cal. 466; *Rutherford v. Hennen*, 13 La. Ann. 336; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; *Payne v. Trezevant*, 2 Bay (S. C.) 23.

*Collecting agent.* *Howe v. Wade*, 4 McLean (U. S.) 319; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Blackledge v. Scales*, 1 Murph. (N. C.) 179; *Nixon v. Bagby*, 7 Jones (N. C.) L. 4; *Cozens v. Pooser*, 1 Spears (S. C.) 325.

*Consignee or Factor.* *Bork v. Norton*, 2 McLean (U. S.) 422; *Brown v. Babcock*, 3 Mass. 29; *Kirkland v. Carr*, 35 Miss. 584; *Jones v. Sinclair*, 2 N. H. 319; *Price v. Powell*, 3 N. Y. 322.

*Contractors and sub-contractors.* *Cusack v. Tomlinson*, 1 E. D. Smith, (N. Y.) 716; *Dickinson College v. Church*, 1 Watts & S. (Pa.) 462; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507.

*Corporate agents.* *Galena & C. R. R. Co. v. Welch*, 24 Ill. 31; *Draper v. Worcester & C. R. R. Co.*, 11 Metc. (Mass.) 505; *Nashville & C. R. R. Co. v. Fugett*, 3 Coldw. (Tenn.) 402.

*Insurance agents.* *Ruan v. Gardner*, 1 Wash. (U. S.) 145; *Mutual & C. Ins. Co. v. Deale*, 18 Md. 26.

*Masters of vessels, or the crew.* *The Hope*, 2 Gall. (U. S.) 48; *Patten v. Darling*, 1 Cliff. (U. S.) 254; *The William Harris*, 1 Ware (U. S.) 367; *Swett v. Black*, 1 Sprague (U. S.) 574; *Furniss v. The Magoun, Olc.* Adm. 55; *The Hudson*, Id. 396; *The Osceola*, Id. 450; *The Medora*, 1 Sprague (U. S.) 138; *Newbold v. Wilkins*, 1 Harr. (Del.) 43; *Descadillas v. Harris*, 8 Me. 298; *The General Worth v. Hopkins*, 30 Miss. 703; *Ward v. Whitney*, 3 Sandf. (N. Y.) 399; *Willard v. Carter*, 5 Jones (N. C.) L. 395; *Galloway v. Morris*, 3 Yeates (Pa.) 445; *McIndoe v. Lunt*, 1 Browne (Pa.) 85; *Schuykill Nav. Co. v. Harris*, 5 Watts & S. (Pa.) 28; *American Ins. Co. v. Insley*, 7 Pa. St. 223.

<sup>1</sup> See also *supra*, §§ 54, 67.

<sup>2</sup> *Riddle v. Mors*, 7 Cranch, 206; *Jones v. Raine*, 4 Rand. (Va.) 386; *Hunter v. Gatewood*, 5 T. B. Mon. (Ky.) 268; *Kelly v. Lank*, 7 B. Mon. (Ky.) 220; *Wing v. Andrews*, 59 Me.

for the costs incurred by the surety in defending the suit.<sup>1</sup> Where the suit was against the surety alone, a release from him was necessary to render the principal a competent witness.<sup>2</sup> Thus, the principal obligor in a bond of indemnity to the sheriff,<sup>3</sup> or in a recognizance for stay of execution,<sup>4</sup> was held incompetent as a witness in proceedings growing out of the giving of the bond. He was not permitted to testify in favor of the surety, even to prove the bond usurious;<sup>5</sup> and suffering a default,<sup>6</sup> or the fact that the proposed witness had been discharged in bankruptcy,<sup>7</sup> did not render him competent.

But a release from the surety would render the principal a good witness.<sup>8</sup> And where the surety, when sued by the obligee, sought relief from his bond, and asked that the suit be enjoined, it was held that the principal obligor was competent to prove a change in his relation to his obligee, which would release the surety from liability. If the plaintiff had succeeded, the principal would not have been discharged from his liability; and if he failed, he must have borne his own costs.<sup>9</sup> So, also, he could show fraud, or a rescission of the contract or obligation.<sup>10</sup> And he was a competent witness in an action by one surety against a co-surety, for contribution,<sup>11</sup> or in favor of the plaintiff, in a suit against the surety only,<sup>12</sup> *e.g.*, to prove the execution by the defendant,

505; *Garrett v. Ferguson*, 9 Mo. 125; *Hale v. Wetmore*, 4 Ohio St. 600; *Commonwealth v. McKee*, 2 Grant (Pa.) Cas. 27; *Vandiver v. Glaspy*, 7 Rich. (S. C.) 14. See also *Cantey v. Blair*, 2 Rich. (S. C.) Eq. 46.

<sup>1</sup> *Cleveland v. Covington*, 3 Strobb. (S. C.) 184; *Marshall v. Franklin Bank*, 25 Pa. St. 384; *Hurst v. Word*, 3 Head (Tenn.) 564.

<sup>2</sup> *Rackley v. Sanders*, 1 Ga. 258; *Richards v. Griffin*, 5 Ala. 195; *Garrett v. Holloway*, 24 Ala. 376; *Moffit v. Gaines*, 1 Ired. (N. C.) L. 158; *Miller v. Stem*, 12 Pa. St. 383.

<sup>3</sup> *Hodge v. Thompson*, 9 Ala. 131.

<sup>4</sup> *Morrison v. Hartman*, 14 Pa. St. 55.

<sup>5</sup> *Jordan v. Trumbo*, 6 Gill & J. (Md.) 103; *Cantey v. Blair*, 1 Rich. (S. C.) Eq. 41.

<sup>6</sup> *Crowell v. Western Reserve Bank*,

3 Ohio St. 406 (a separate judgment not having been rendered against the principal). *Contra*, *Mix v. Marder*, 79 Ky. 131; *Prevle Bank v. Russell*, 1 Ohio St. 313; *Simpson v. Bovard*, 74 Pa. St. 351.

<sup>7</sup> *Cake v. Lewis*, 8 Pa. St. 493.

<sup>8</sup> *Pogue v. Joyner*, 7 Ark. 462; *Holland v. Chambers*, 22 Ga. 193; *Field v. Davidson*, 9 B. Mon. (Ky.) 77.

<sup>9</sup> *Gass v. Stinson*, 2 Sumn. (U. S.) 453. *S. P. Reid v. Watts*, 4 J. J. Marsh. (Ky.) 440; *Kennedy v. Evans*, 31 Ill. 258; *Armistead v. Ward*, 2 Pat. & H. (Va.) 504. But see *Cannon v. Jones*, 4 Hawks (N. C.) 368.

<sup>10</sup> *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

<sup>11</sup> *Leavenworth v. Pope*, 6 Pick. (Mass.) 419; *Hunt v. Chambliss*, 7 Sm. & M. (Miss.) 532.

<sup>12</sup> *Morse v. Greene*, 13 N. H. 32.

of the bond sued on, the plea of *non est factum* having been interposed.<sup>1</sup>

(2) *Surety*. A surety who was directly interested in the event of the suit could not be a witness;<sup>2</sup> but where his interest was remote and contingent;<sup>3</sup> or where there were several similar cases, and the witness, though interested in some of them, was not in the one in which he was called as a witness;<sup>4</sup> or, being one of two or more sureties he was not made a party to the action on trial;<sup>5</sup> or where, in any event he could not be called upon to satisfy the judgment in whole or in part;<sup>6</sup> or where he was willing to testify against his own interest,<sup>7</sup> the surety was usually permitted to testify. So the surety on an appeal bond was held competent at the trial on the appeal,<sup>8</sup> especially on being released and another surety substituted in his place;<sup>9</sup> and on an issue *devisavit vel non*, the security to the administration which had been granted *pendente lite* was held admissible as a witness to support the will.<sup>10</sup> Again, the interest of a surety on a replevin bond was removed by a deposit for his use, made with the clerk of the court, by the plaintiff, of an amount equal to the penalty of the bond.<sup>11</sup> And, as a witness for the principal in a covenant, the surety, also a defendant, could testify to sustain the defence set up by the principal that he was to be bound only on condition that another would execute the covenant, which had not been done.<sup>12</sup> So, also, one who, without consideration, guaranteed a bond could be a witness for the obligors to show a usurious consideration.<sup>13</sup>

<sup>1</sup> *Buckingham v. Clary*, 4 Gill (Md.) 223.

<sup>2</sup> *Reigart v. Hicks*, 14 S. & R. (Pa.) 134. So held of the surety of a delinquent cashier, in an action to recover money improperly paid out by the principal. *State Bank v. Littlejohn*, 2 Dev. (N. C.) L. 381. See also *Colgin v. State Bank*, 11 Ala. 222.

<sup>3</sup> *Townshend v. Townshend*, 6 Md. 295.

<sup>4</sup> *Kimball v. Thompson*, 4 Cush. (Mass.) 441. *S. P. Covington & Co. v. Ingles*, 15 B. Mon. (Ky.) 637.

<sup>5</sup> *Craig v. Calloway County Court*, 12 Mo. 94; *Gilliam v. Henneberry*, 6 Jones (N. C.) L. 223; *Leech v. Kennedy*, 3 Strobb. (S. C.) 488.

<sup>6</sup> *Hill v. Hill*, 32 Pa. St. 511.

<sup>7</sup> *Molyneux v. Collier*, 13 Ga. 406.

<sup>8</sup> *White v. Bailey*, 10 Mich. 155.

<sup>9</sup> *McCulloch v. Tyson*, 2 Hawks. (N. C.) 336. *S. P. Craighead v. State Bank*, 1 Meigs (Tenn.) 199; *Ross v. Blair*, Id. 525.

<sup>10</sup> *Martin v. Hough*, 2 Hawks (N. C.) 368.

<sup>11</sup> *Cooper v. Bakeman*, 33 Me. 376.

<sup>12</sup> *Millett v. Parker*, 2 Metc. (Ky.) 608.

<sup>13</sup> *Caldwell v. M'Cortney*, 2 Gratt. (Va.) 187. See also *Fairfax v. Fairfax*, 2 Cr. C. C. 25; *Thompson v. Carberry*, Id. 35; *Craig v. Reintzell*, Id. 128; *Ferguson v. Cappeau*, 6 Har. & J. (Md.) 394.

For further cases illustrating the extent to which sureties upon the different kinds of bonds were deemed

§ 75. **Prosecutors, Informers, and Persons entitled to Rewards.**—Formerly it was held that the prosecutor, *i.e.*, the individual at whose instance the process of the criminal law is set on foot against one accused of crime, was incompetent to testify on the trial of the accused, for the reason that the record of conviction would be evidence in favor of the witness in a subsequent civil action.<sup>1</sup> Particularly, was he excluded for this reason on trials for forgery and perjury. But it became well settled long ago that the record in a criminal prosecution cannot be used as evidence in a civil action, either at law or in equity, except to prove the mere fact of the adjudication, or a judicial confession of guilt by the party indicted;<sup>2</sup> so that this objection was no longer listened to. Another objection to the witness was that in case the prosecution was found frivolous or malicious, the prosecutor would be liable to pay the costs, but this was also overruled.<sup>3</sup> So, also, the objection that a prosecuting witness has contributed funds to carry on the prosecution was held to go to his credibility only.<sup>4</sup>

competent, at common law, to testify in favor of their principals, see the references given below:—

*Administration bond.* McCreelis v. Hinkle, 17 Ala. 459; Henderson v. Simmons, 33 Ala. 291; Bean v. Jenkins, 1 Har. & J. (Md.) 135; Owens v. Collinson, 3 Gill & J. (Md.) 25; Mitchell v. Mitchell, 11 Id. 388; Same v. Same, 1 Gill (Md.) 66; Blood v. Hayman, 13 Metc. (Mass.) 231; Kaywood v. Barnett, 3 Dev. & B. (N. C.) L. 91; Reeme v. Parthemere, 8 Pa. St. 460; Anderson v. Smoot, 2 Rich. (S. C.) Eq. 285.

*Attachment bond.* Atkins v. Guice, 21 Ark. 164; Rucker v. Pritchett, 3 Bush (Ky.) 689; Peters v. Moss, 1 Sm. & M. (Miss.) 331.

*Bastardy bond.* Chapel v. White, 3 Cush. (Mass.) 537.

*Bond for costs.* Miller v. Henshaw, 4 Dana (Ky.) 325; Black v. Crain, 10 Yerg. (Tenn.) 516.

*Bond for title.* Shelby v. Smith, 2 A. K. Marsh. (Ky.) 504.

*Forthcoming bond.* Bates v. The Madison, 18 Mo. 99; Greene v. Tims, 16 Ala. 541.

*Insolvency bond.* Browning v. Cooper, 3 Harr. (N. J.) 196; Mann v. Drost, Id. 336.

*Replevin bond.* Poe v. Dorrah, 20 Ala. 288; Cook v. Lyon, 10 Iowa, 433; Johnson v. Whidden, 32 Me. 230; Sanderson v. Marks, 1 Harr. & G. (Md.) 252; Morton v. Beall, 2 Id. 136; Myers v. Clark, 3 Watts & S. (Pa.) 535; Daniels v. Fitch, 8 Pa. St. 495.

As to the competency of one co-surety to testify for another, see Governor of Virginia v. Evans, 1 Cr. C. C. 581; Jones v. Letcher, 13 B. Mon. (Ky.) 363; Low v. Smart, 5 N. H. 353; Keer v. Clark, 11 Humph. (Tenn.) 77.

Or against another, see Rowe v. Ware, 30 Ga. 278.

<sup>1</sup> R. v. Whiting, 1 Salk. 283; overruled in R. v. Broughton, 2 Str. 1229. See also R. v. Ellis, 2 Str. 1104; R. v. Nunez, Id. 1042.

<sup>2</sup> 1 Greenl. Ev. (14 Ed.) § 537, and cases cited; State v. McGrew, 13 Rich. (S. C.) 316.

<sup>3</sup> State v. Blennerhassett, 1 Miss. 7; Gilliam's case, 4 Leigh (Va.) 688.

<sup>4</sup> People v. Cunningham, 1 Den. (N. Y.) 524.

But a more serious objection to the competency of the prosecutor or informer was, that the whole or part of the penalty, in *qui tam* actions, and prosecutions punishable by penalty or fine, is generally given, by statute, to the prosecutor or informer, and this rendered him interested in the event of the prosecution; so also the owner of stolen property would be entitled in many cases, on conviction of the thief, to a restoration of the property, thus rendering him interested; and the same principal applied the witnesses for the government, who, in the event of conviction, would be entitled to receive a reward from the government. On grounds of public policy and convenience, and to prevent a failure of justice, it was found necessary to except these witnesses from the operation of the general rule of exclusion by reason of interest.<sup>1</sup> Thus the owner of property injured was admitted in a prosecution for malicious injury;<sup>2</sup> and in a prosecution for trespass after warning, under a statute, the owner of the *locus in quo* was admitted, notwithstanding the statute gave him the fine imposed in case of conviction.<sup>3</sup> So an informer was held competent, though he was to receive part of the penalty.<sup>4</sup> In one case a release of his interest was required before the informer was allowed to testify.<sup>5</sup>

§ 76. **Servants.**—Much of what has already been said in treating of the competency of agents<sup>6</sup> is equally applicable here, and all that remains to be done is to examine a few cases not before cited. Servants were deemed competent

<sup>1</sup> *Murphy v. State*, 28 Miss. 637, where it is said these witnesses are to be admitted to testify in three classes of cases, to wit: (1) When the statute cannot be enforced without the aid of such a witness. (2) In cases of necessity, when no other evidence can reasonably be expected. (3) Where, though a person is to receive a reward on the conviction of an offender, it can be inferred from the language, or the professed objects, of the statute which gives the penalty to the informer, that it was intended to make him a competent witness.

<sup>2</sup> *State v. Truss*, 9 Port. (Ala.) 126; *Lemon v. State*, 19 Ark. 171.

<sup>3</sup> Ala. Code, 1876, § 4420; *Bohanon v. State*, 73 Ala. 47.

<sup>4</sup> *United States v. Patterson*, 3 McLean (U. S.) 53, 299; *State v. Bennett*, 1 Root (Conn.) 249; *United States v. Wilson*, 1 Baldw. (U. S.) 78; *City Council v. Sibley*, 2 Brev. (S. C.) 34.

<sup>5</sup> *City Council v. Haywood*, 2 Nott & M. (S. C.) 308. And see *Com. v. Ohio & C. R. R. Co.*, 1 Grant (Pa.) Cas. 329; *Bradley v. Couch*, 1 Root (Conn.) 361; *Com. v. Hargesheimer*, 1 Ashm. (Pa.) 413; *Bill v. Scott*, Kirby (Conn.) 62; *People v. Bill*, 10 Johns. (N. Y.) 95; *Baker v. Commonwealth*, 2 Va. Cas. 353; *Simpson v. Hall*, 4 S. & R. (Pa.) 337; *Rapp v. Le Blanc*, 1 Dall. (U. S.) 63; *McVeagh v. Goods*, Id. 62.

<sup>6</sup> *Supra*, § 73.

witnesses without a release, to prove the payment or receipt of money, or the delivery of goods, on the part of their masters, though their evidence tended to discharge themselves.<sup>1</sup> Thus a servant in charge of his master's property, which has been injured by the negligence of another, is a competent witness in an action by the master for damages.<sup>2</sup> And in an action against the master of a canal-boat for negligence in navigating her, whereby injury is done to her, the helmsman of the defendant is a competent witness for him, if the defendant had the immediate charge and direction of the boat at the time of the injury.<sup>3</sup> So, also, a cropper, or overseer who was to receive for his services a share of the crop planted in the field where a trespass was committed, is a competent witness for the plaintiff.<sup>4</sup>

A clerk who has received money is a competent witness for the person who paid it, to prove the payment, though he is himself liable on the receipt of it;<sup>5</sup> and the fact that a clerk's compensation depends somewhat upon the amount of sales, will not disqualify him as a witness for his employer.<sup>6</sup> So, also, a clerk who pays out the money of his employer by mistake is a competent witness for his employer in an action to recover it back.<sup>7</sup>

Under special statutory provisions, the engineer in charge of a train, or other employee of the railroad, causing an injury, is not a competent witness for the company in an action to recover damages therefor, without a release.<sup>8</sup> But in the absence of such a statute, a hired laborer who works under the eye and immediate direction of his employer, if responsible to any one for negligence or unskilfulness, is responsible only to his employer; and, being released by him, he is a competent witness in an action for negligence and unskilfulness in the performance of a contract under which the work

<sup>1</sup> *Alexander v. Emerson*, 2 Litt. (Ky.) 25; *Phelps v. Sinclair*, 2 N. H. 554; *Bank of Kentucky v. McWilliams*, 2 J. J. Marsh. (Ky.) 256; Bull. N. P. 289.

<sup>2</sup> *Dudley v. Bolles*, 24 Wend. (N. Y.) 465.

<sup>3</sup> *Noble v. Paddock*, 19 Wend. (N. Y.) 456; *Barnes v. Cole*, 21 Id. 188.

<sup>4</sup> *Carter v. Pinchbeck*, 7 Rich. (S. C.) 356.

<sup>5</sup> *Matthews v. Hayden*, 2 Esp. 509.

<sup>6</sup> *Roberts v. Totten*, 13 Ark. 609; *Diggs v. Kirkland*, 8 La. Ann. 309; *Wright v. Rogers*, 18 Id. 671. S. P. *Campbell v. Thompson*, 16 Me. 117.

<sup>7</sup> *Burd v. Ross*, 15 Mo. 254.

<sup>8</sup> *Catawissa R. R. Co. v. Armstrong*, 49 Pa. St. 186; *Chicago & C. R. R. Co. v. Hutchins*, 34 Ill. 108; *Memphis & C. R. R. Co. v. Tugwell*, 1 Coldw. (Tenn.) 91; or even it seems with a release. *Horne v. Memphis & C. R. R. Co.* 1 Coldw. (Tenn.) 72.

was done.<sup>1</sup> So, where two laborers commit a trespass on personal property, they are competent to prove that the defendant directed them to do the act.<sup>2</sup> Again, a pilot is a competent witness for the owners of a steamer, in an action against them to recover damages for a loss occasioned by negligence, unless it was his own negligence,<sup>3</sup> or by an unjustifiable jettison of plaintiff's goods.<sup>4</sup> But where the defence is that the loss was occasioned by the want of skill or negligence of the pilot, he is not a competent witness for the plaintiff.<sup>5</sup> So, also, in an action against a town, to recover the value of goods laden on a wagon, alleged to have been lost by reason of a defect in a highway;<sup>6</sup> or against the owners of a steamboat for the loss of a wagon in crossing a ferry,<sup>7</sup> or by collision with a ferry-boat;<sup>8</sup> or against one who forcibly took a horse from the team,<sup>9</sup> the driver in charge at the time is a competent witness for his principal, the plaintiff. And a cartman employed by plaintiff to deliver goods for transportation to a railroad company is a competent witness for plaintiff to prove the delivery, without a release.<sup>10</sup>

§ 77. **Shareholders and Corporate Officers.** — The general rule excluding parties to the record<sup>11</sup> was formerly held to apply to members of a corporation suing or sued in its corporate name, to the same extent as to parties suing or sued in their individual capacities. Thus, in ejectment for lands of a corporation, one of its members was not allowed to testify, if interested either in the lands sought to be recovered, or in the general funds of the corporation which were liable to the costs of the action.<sup>12</sup> But in England, since Lord Denman's act,<sup>13</sup> persons *not individually named in the record* are competent though in truth parties in interest; consequently members of a corporation suing or sued in its corporate name are no longer incompetent merely by reason of being parties in interest: and the same is the rule in this country.<sup>14</sup>

<sup>1</sup> Downer v. Davis, 19 Pick. (Mass.)

<sup>9</sup> Moore v. Shenk, 3 Pa. St. 13.

72.

<sup>2</sup> Jones v. Lowell, 35 Me. 538.

<sup>10</sup> Moses v. Boston &c. R. R. Co., 24 N. H. 71.

<sup>3</sup> Johnson v. Lightsey, 34 Ala. 169.

<sup>11</sup> *Supra*, chap. IV.

<sup>4</sup> Bentley v. Bustard, 16 B. Mon. (Ky.) 643.

<sup>12</sup> Doe v. Tooth, 3 Younge & J. 19; Godmanchester v. Phillips, 4 Ad. & E. 550. See also Weller v. Foundling Hospital, Peake, N. P. 153.

<sup>5</sup> Plumer v. Alexander, 12 Pa. St. 81.

<sup>6</sup> Littlefield v. Portland, 26 Me. 37.

<sup>7</sup> Harris v. Plant, 31 Ala. 639.

<sup>13</sup> 6 & 7 Vict. c. 85.

<sup>8</sup> Otis v. Thom, 23 Ala. 469.

<sup>14</sup> *Infra*, chap. VIII.



In considering the competency of members of corporations as against the objection of interest in the event, regard must be had to the two great classes of corporations, *public* and *private*, to one or the other of which every corporation belongs; for it was a well settled rule, that in all cases where the corporation suing or sued was of a public nature, comprehending one of the divisions of the State, such as a county, town, school district, parish, or village, the members of such corporation were competent witnesses; for they are not considered as having a personal, but only a corporate interest, which ought to go to the credit only, and not to the competency; and there are many instances where, if they were excluded, no testimony whatever could be obtained.<sup>1</sup> And in this category are also to be included institutions for charitable or pious purposes, which, though strictly speaking, private corporations, are also of a public nature; the members therefore, having no individual interest, are competent witnesses.<sup>2</sup>

But in the case of all private corporations except religious societies and charities, including all moneyed institutions, such as banks, insurance, manufacturing, railroad, and telegraph companies, and the like, where membership is obtained by the purchase of stock or shares, and the interest thus acquired is private, pecuniary, and vested, like ownership of any other sort of property, a different rule prevailed, and members of such corporations were excluded from the witness-box, at common law, on the ground of interest, the same as were individuals suing or being sued alone.<sup>3</sup>

In applying these principles as regards public corporations, it has been repeatedly held that inhabitants of towns are competent witnesses in actions where the towns are parties;<sup>4</sup>

<sup>1</sup> Smith v. Barber, 1 Root (Conn.) 207; Methodist Church v. Wood, Wright (Ohio) 12; Ezell v. Giles County, 3 Head (Tenn.) 583; Kemper v. Victoria, 3 Tex. 135.

<sup>2</sup> Cincinnati v. Wood, 5 Ohio, 583; Miller v. Mariners' Church, 7 Me. 51; Methodist Church v. Wood, 5 Ohio, 283; Davies v. Morris, 17 Pa. St. 205.

<sup>3</sup> Maysville v. Shultz, 3 Dana (Ky.) 13, 14; Methodist Church v. Wood, Wright (Ohio) 12; Digby v. Kenton

Iron Co., 8 Bush (Ky.) 166. And see Skelton v. Tomlinson, 2 Root (Conn.) 132.

<sup>4</sup> Hunter v. Marlborough, 2 Woodb. & M. (U.S.) 168; Mayor & c. v. Wright, 2 Port. (Ala.) 230; Barada v. Caundele, 8 Mo. 644; Canning v. Pinkham, 1 N. H. 353; Schenck v. Corshen, Cox (N. J.) 189; Orange v. Springfield, 1 South. (N. J.) 186; Roll v. Maxwell, 2 Id. 493; Jackson v. Hillsborough, 1 Dev. & B. (N. C.) L. 177; Maysville

and so are inhabitants of a county made a party to the suit,<sup>1</sup> or of a State,<sup>2</sup> or of a municipal corporation,<sup>3</sup> or of a school district.<sup>4</sup> So, also, the fact that the penalty which may be recovered in a criminal case will go to a particular town, does not render the inhabitants of that town incompetent witnesses for the State, in the prosecution.<sup>5</sup> In Pennsylvania and Vermont, a distinction, similar to that which existed for a long time in England, was made, between taxed (rated) and untaxed, but taxable (ratable) inhabitants, the former being excluded and the latter admitted,<sup>6</sup> but the incompetency of rated inhabitants was long since removed by statute, in England,<sup>7</sup> and also in those of the States which had followed the English distinction.<sup>8</sup>

But where the inhabitants of the corporation suing or being sued were individually and personally interested in the event of the suit, they were deemed incompetent witnesses. Thus it is held that where a party sets up a common right in all the inhabitants of a town, an inhabitant of such town is not a competent witness to establish the right.<sup>9</sup> So an inhabitant could not prove a right of way by prescription in all the inhabitants;<sup>10</sup> nor a customary right in them to take shell-fish in a particular place;<sup>11</sup> for a verdict for one inhabitant, in such a case, would be evidence for another claiming in the same right. But this ground of objection has also been removed by statute.<sup>12</sup>

*v. Schultz*, 3 Dana (Ky.) 10; *Pond v. Sage*, 1 D. Chip. (Vt.) 250; *Smith v. Barber*, 1 Root (Conn.) 207; *Salisbury v. Harwinton*, Id. 435.

<sup>1</sup> *Burlington v. Fenimore, Coxe* (N. J.) 190.

<sup>2</sup> *Connecticut v. Bradish*, 14 Mass. 296.

<sup>3</sup> *Sawyer v. Alton*, 4 Ill. 127; *Trustees of Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Pack v. Mayor of New York*, 3 N. Y. 489; *Mann v. Yazoo City*, 31 Miss. 574, *Lewis v. San Antonio*, 7 Tex. 288; *Mayor &c. v. Wright*, 2 Port. (Ala.) 230.

<sup>4</sup> *Gass v. Gass*, 3 Humph. (Tenn.) 278.

<sup>5</sup> *State v. Woodward*, 34 Me. 293.

<sup>6</sup> *Commonwealth v. Baird*, 4 S. & R. (Pa.) 141; *Chester v. Rockingham*, *Brayt.* (Vt.) 239. *Contra*, *Bloodgood*

*v. Jamaica*, 12 Johns. (N. Y.) 285. See *Doe d. Harrison v. Murrell*, 8 Car. & P. 124.

<sup>7</sup> 54 Geo. III. c. 170, § 9; 3 & 4 Vict. c. 26.

<sup>8</sup> *Barnet v. School Directors*, 6 Watts & S. (Pa.) 46; *Peachum v. Carter*, 21 Vt. 515. And see *infra*, chap. VIII.

<sup>9</sup> *Moore v. Griffin*, 22 Me. 350; *Jacobson v. Fountain*, 2 Johns. (N. Y.) 170; *Gould v. James*, 6 Cow. (N. Y.) 369.

<sup>10</sup> *Odiorne v. Wade*, 8 Pick. (Mass.) 518.

<sup>11</sup> *Lufkin v. Haskell*, 3 Pick. (Mass.) 356.

<sup>12</sup> 3 & 4 Wm. IV. c. 42; *Look v. Bradley*, 13 Metc. (Mass.) 369; *Infra*, chap. VIII.

As to the competency of township

Members of charitable and religious societies, who can have no personal and private pecuniary interest in the event of the litigation in which the corporation is involved, are competent witnesses at common law,<sup>1</sup> if they have no personal or private interest in the property of the corporation.<sup>2</sup> Upon this ground a member of the society of freemasons,<sup>3</sup> the prudential committee of a school district,<sup>4</sup> or the trustees of such district,<sup>5</sup> or of an independent educational institution,<sup>6</sup> and members of the society of Shakers, though they hold all things in common, unless the suit directly concerns the common property, in which case they must first release their interest,<sup>7</sup> are competent witnesses in favor of the society or institution to which they belong. So are treasurers of church corporations,<sup>8</sup> trustees of a ministerial fund,<sup>9</sup> or of a society for the instruction of seamen,<sup>10</sup> or even of a savings bank, provided such trustees be not stockholders or depositors.<sup>11</sup>

We now come to consider more in detail the cases on the competency of shareholders and members of pecuniary or moneyed corporations, to testify in suits by or against the corporation: and first it may be observed that the earlier decisions hold them incompetent in all cases where there is a common fund distributable among the members, and in which they therefore have a private, personal interest which might

officers to testify in actions by or against the town, see *Ferris v. Ward*, 9 Ill. 499; *Emerson v. Newbury*, 13 Pick. (Mass.) 377; *Stewart v. Saybrook Township*, Wright (Ohio) 374; *McFarland v. Commissioners &c.*, 12 S. & R. (Pa.) 297; *Prescott v. Duquesne*, 48 Pa. St. 118; *Yuran v. Randolph*, 6 Vt. 369; *Reed v. Field*, 15 Vt. 672; *Batley v. Duxbury*, 23 Vt. 714; *White v. Inhabitants of Phillipston*, 10 Metc. (Mass.) 108; *Highway Commr's v. Stockman*, 5 Mich. 528; *Peck v. Freeholders of Essex*, 1 Spenc. (N. J.) 457; *State v. Williams*, 13 Ohio, 495.

<sup>1</sup> *Nason v. Thatcher*, 7 Mass. 398; *Hebrew Cong. v. United States*, 6 Ct. of Cl. 241; *Shortz v. Unangst*, 3 Watts & S. (Pa.) 45. *Contra*, *Stone v. Berkshire Cong. Soc.*, 14 Vt. 86.

<sup>2</sup> *Sorg v. First German &c. Cong.*, 63 Pa. St. 156.

<sup>3</sup> *Burdine v. Grand Lodge*, 37 Ala.

478; s. c., Ala. Sel. Cas. 385; *Trapnall v. Burton*, 24 Ark. 371.

<sup>4</sup> *Hill v. School District No. 2*, 17 Me. 316; *Allen v. Westport*, 15 Pick. (Mass.) 35.

<sup>5</sup> *Holbrook v. Trustees*, 22 Ill. 539.

<sup>6</sup> *Hershy v. Clarksville Institute*, 15 Ark. 128.

<sup>7</sup> *Anderson v. Brock*, 3 Me. 243; *Richardson v. Freeman*, 6 Me. 57; *Wells v. Lane*, 8 Johns. (N. Y.) 462.

<sup>8</sup> *Matter of Kip*, 1 Paige (N. Y.) 601.

<sup>9</sup> *Ministerial Fund v. Reed*, 39 Me. 41.

<sup>10</sup> *Miller v. Mariners' Church*, 7 Me. 51.

<sup>11</sup> *Middleton Savings Bank v. Bates*, 11 Conn. 519. To the contrary, see *Adams v. Leland*, 7 Pick. (Mass.) 62, where a trustee of a charity was held incompetent by reason of his liability for costs, even though, pending the suit, he had resigned his trust.

be affected by the event of the suit.<sup>1</sup> But the witness could be rendered competent to testify for the corporation by a *bona fide* sale or transfer of his shares in the corporate stock before suit brought,<sup>2</sup> though the debt sued for existed at the time of the transfer, and continued to exist until the suit was brought.<sup>3</sup> So, also, the witness could be rendered competent by disfranchisement, which was effected by means of an information in the nature of a *quo warranto* against him, which he confessed, whereupon the plaintiff took a judgment disfranchising him.<sup>4</sup> But there were many facts as to which even the earlier decisions permitted the corporator or stockholder to testify: thus he could produce and identify a paper in his custody; or prove that he was the depository of the muniments of the corporation; or verify the records of the company;<sup>5</sup> or prove its account.<sup>6</sup> He could also testify to his official acts as treasurer of the company,<sup>7</sup> or prove a contract made by him as agent of the corporation, and his authority to make it,<sup>8</sup> or service of a notice by him as such agent.<sup>9</sup> So, also, he could prove the acceptance by the company of an amendment to its charter.<sup>10</sup> Again, a member of a corporation, who was its surety for the payment of a debt not in controversy in the suit on trial, was not on that account an incompetent witness for the corporation.<sup>11</sup> It is no sufficient ground for excluding a witness from testifying for a corporation,

<sup>1</sup> Doe d. Mayor &c. v. Tooth, 3 Younge & J. 19; Davies v. Morgan, 1 Tyrwh. 457; City Council v. King, 4 McCord (S. C.) 487, 488; Montgomery &c. Co. v. Webb, 27 Ala. 618; Moke-lumne &c. Co. v. Woodbury, 14 Cal. 265; Jefferson v. Stewart, 4 Harr. (Del.) 82; Southern &c. Co. v. Cole, 4 Fla. 359; Thrasher v. Pike &c. R. R. Co., 25 Ill. 393; Pierce v. Kearney, 5 Hill (N. Y.) 82; Hill v. Frazier, 22 Pa. St. 320.

<sup>2</sup> Tuolumne &c. Co. v. Columbia &c. Co., 10 Cal. 193. But see McAuley v. York Mining Co., 6 Cal. 80; Mill-Dam Foundry v. Hovey, 21 Pick. (Mass.) 453.

<sup>3</sup> Smith v. Talassee Branch of Central Plank-Road Co., 30 Ala. 650; Mutual Fire Ins. Co. v. Marseilles &c. Co., 6 Ill. 236; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 296; Union

Bank v. Owen, 4 Humph. (Tenn.) 338.

<sup>4</sup> Mayor of Colchester v. ———, 1 P. Wms. 595.

<sup>5</sup> Ryder v. Alton &c. R. R. Co., 13 Ill. 516; Blen v. Bear River &c. Co., 20 Cal. 602; Peake v. Wabash R. R. Co., 18 Ill. 88; Union Bank v. Ridgely, 1 Har. & G. (Md.) 324; Wiggin v. Freewill Church, 8 Metc. (Mass.) 301.

<sup>6</sup> Cooper v. Sisters of Providence, 16 Ind. 164.

<sup>7</sup> York &c. R. R. Co. v. Pratt, 40 Me. 447.

<sup>8</sup> Ridgely v. Dobson, 3 Watts & S. (Pa.) 118. S. P. Rhodes v. Sherrod, 9 Ala. 63.

<sup>9</sup> Union Canal Co. v. Loyd, 4 Watts & S. (Pa.) 393.

<sup>10</sup> Fell v. McHenry, 42 Pa. St. 41.

<sup>11</sup> Miller v. Mariners' Church, 7 Me. 51.

that he may be liable, under the statute, for the debts of the corporation, on account of his having been a stockholder therein.<sup>1</sup>

The practical utility of all these decisions has been much diminished in several of the States by the enactment of express statutes making members of private corporations competent witnesses, and in others by general statutes removing the disqualification of interest from witnesses generally.<sup>2</sup>

§ 78. **Trustee or Cestui que Trust.** — (1) *Trustee*. The decisions bearing on the competency of trustees of corporate bodies and charitable and eleemosynary institutions have just been examined; we come now to consider the effect of the private relation of trustee and *cestui que trust* upon the competency, at the common law, of the parties to that relation.

In England, prior to Lord Denman's act, and in several of the States of the Union, before the passage of the enabling acts, a party to an action sued as a mere trustee for another

<sup>1</sup> *White Mountains R. R. Co. v. Eastman*, 34 N. H. 124; *Manchester Bank v. White*, 30 N. H. 456. See also *Hasey v. White Pigeon & Co.*, 1 Dougl. (Mich.) 193.

<sup>2</sup> See *infra*, chap. VIII.; also the following cases: *Bredow v. Mutual Savings Institution*, 28 Mo. 181; *Barclay v. Globe & Co. Ins. Co.*, 26 Mo. 490; *Bergen & Co. Association v. Cole*, 2 Dutch (N. J.) 362; *Montgomery Bank v. Marsh*, 7 N. Y. 481; *New York & C. R. R. Co. v. Cook*, 2 Sandf. (N. Y.) 732; *Washington Bank v. Palmer*, Id. 686.

As to *stockholders and officers of banks*, see *Bank v. Wycoff*, 4 Dall. (U. S.) 151; *Bank of Alexandria v. McCrea*, 2 Cr. C. C. 649; *Bank v. Bates*, 11 Conn. 519; *Huntress v. Patten*, 20 Me. 28; *Bank of Oldtown v. Houlton*, 21 Me. 501; *Lewis v. Eastern Bank*, 32 Me. 90; *Leominster v. Fitchburg & C. R. R. Co.*, 7 Allen (Mass.) 38; *Lake v. Munford*, 12 Miss. 312; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466; *Montgomery County Bank v. Marsh*, 11 Barb. (N. Y.) 645; *New York & C. Bank v. Gibson*, 5 Duer (N. Y.) 574; *Petitt v. First & C. Bank*, 4 Bush (Ky.) 334; *Stevenson v. Simmons*, 4 Jones,

(N. C.) L. 12; *Porter v. Bank of Rutland*, 19 Vt. 410; *Sterling v. Marietta Company*, 11 S. & R. (Pa.) 179; *Stewart v. Huntingdon Bank*, Id. 267; *Jackson v. Bank of United States*, 10 Pa. St. 61; *Meighen v. Bank*, 25 Pa. St. 288.

*Officers of insurance companies*, see *United States v. Johns*, 4 Dall. (U. S.) 412; *National & C. Ins. Co. v. Crane*, 16 Md. 260; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250.

*Manufacturing companies*, see *Wyman v. American Powder Co.*, 8 Cush. (Mass.) 168.

*Railroad companies*, see *Alabama & C. R. R. Co. v. Sanford*, 36 Ala. 703; *Philadelphia & C. R. R. Co. v. Hickman*, 28 Pa. St. 318; *Newcastle & C. R. R. Co. v. Brumback*, 5 Ind. 543; *New Albany & C. R. R. Co. v. Gillespy*, 7 Ind. 245; *Penobscot & C. R. R. Co. v. Dunn*, 39 Me. 587.

*Turnpike companies*, see *Unthank v. Turnpike Co.*, 6 Ind. 125; *Turnpike Co. v. Burdett*, 7 Dana (Ky.) 99.

*Toll-bridge companies*, see *Watson v. Lisbon Bridge*, 14 Me. 201; *Americoggin Bridge v. Bragg*, 11 N. H. 102.

*Water companies*, see *Wolf v. St. Louis & C. Co.*, 15 Cal. 319.

person, though he had no interest in the question in dispute, was, nevertheless, liable to costs; and on that ground was considered incompetent as a witness.<sup>1</sup> But the more prevalent rule in this country, even at a comparatively early date, was, that a mere naked trustee, having no real interest in the suit in which he was joined as a defendant, was a competent witness for a co-defendant.<sup>2</sup> Even where he was rejected at law, he was admitted as a witness in equity.<sup>3</sup> So, also, it was formerly held that a plaintiff of record could not be examined as a witness to support the action, although he was shown to be a mere trustee by other testimony; nor could he be made competent by the deposit of a sum of money sufficient to cover the costs of the suit, although he at the same time released all his interest in the sum to be recovered to the person beneficially entitled to it;<sup>4</sup> but the better opinion was that where the name of a plaintiff for the use of another is on the record only as a naked trustee, and the *cestuis que trust* who are liable for costs are alone interested in the suit, and could have maintained it in their own names as legal plaintiffs, such plaintiff for use is a competent witness for them.<sup>5</sup>

A trustee under a will, who took no beneficial interest under the will, was a good attesting witness;<sup>6</sup> and competent to testify in a suit involving the validity of the will<sup>7</sup> or deed of trust.<sup>8</sup> But one of several trustees who was interested to keep the trust fund as large as possible, was deemed incompetent to testify in an action against his co-trustees;<sup>9</sup> and a trustee who had misapplied a portion of the trust fund was

<sup>1</sup> Dowdswell v. Nott, 2 Vern. 317; Phillips v. Buckingham, 1 Id. 230; Bauerman v. Radenius, 7 T. R. 668; Davis v. Morgan, 1 Tyrwh. 457; s. c., 1 Crompt. & J. 87; Hawkins v. Hawkins, 2 Law Repos. (N. C.) 627.

<sup>2</sup> Main v. Newson, Anth. (N. Y.) 18; Johnson v. Cunningham, 1 Ala. 249; Hardwick v. Hook, 8 Ga. 354; McLaughlin v. McLaughlin, 16 Mo. 242; Hale v. Meegan, 39 Mo. 272; Neville v. Demeritt, 1 Gr. (N. J.) Eq. 321; Jones v. Sosser, 1 Dev. & B. (N. C.) L. 452; Harvey v. Alexander, 1 Rand. (Va.) 219; Taylor v. Moore, 2 Id. 563.

<sup>3</sup> Hawkins v. Hawkins, 2 Law Repos. (N. C.) 627.

<sup>4</sup> Stone v. Bibb, 2 Ala. 100.

<sup>5</sup> Keim v. Taylor, 11 Pa. St. 163; Spaulding v. Bull, 1 Duv. (Ky.) 311. See also Eacho v. Cosby, 26 Gratt. (Va.) 112.

<sup>6</sup> Phipps v. Pitcher, 6 Taunt. 220; Comstock v. Hadlyme, 8 Conn. 254.

<sup>7</sup> Peralta v. Castro, 6 Cal. 354; Montgomery v. Perkins, 2 Metc. (Ky.) 448. But see Sears v. Dillingham, 12 Mass. 358.

<sup>8</sup> Johnson v. Cunningham, 1 Ala. 249.

<sup>9</sup> Hayden v. Cornelius, 12 Mo. 321.

not a competent witness by whom to show the purposes for which the trust was created.<sup>1</sup>

After the execution and termination of the trust,<sup>2</sup> or after the trust property had passed out of his hands, by decree of a court of competent authority,<sup>3</sup> the trustee became competent to testify as to the title to the trust property, or as to demands against the *cestuis que trust*.<sup>4</sup>

(2) *Cestui que Trust*. Under the principle that a witness should not be permitted to testify either to increase or protect a fund in which he is entitled to participate, a *cestui que trust* was not allowed, at common law, to support by his testimony the title of his trustee;<sup>5</sup> or to assist him in a suit for the recovery of property alleged to belong to the trust estate;<sup>6</sup> as, for instance, an ejectment suit.<sup>7</sup> But in an action by a purchaser from the trustee to recover the property, the *cestui que trust* was held a competent witness for the plaintiff, his testimony being clearly against interest.<sup>8</sup>

§ 79. **Usurious Contracts, Parties to.**—(1) *Borrower*. It was held at common law, that where the equity of redemption has been sold by the sheriff, and no decree of foreclosure is necessary as against the mortgagor, he may prove usury in the mortgage;<sup>9</sup> and that he may also do so where he has suffered a bill to foreclose to be taken *pro confesso* against him, another party to the suit attacking the mortgage as usurious.<sup>10</sup> In some jurisdictions it was held that the borrower of money lent upon usury may be a competent witness to prove the usury against the lender, who sues upon the usurious contract, if the lender will not deny the usury on oath;<sup>11</sup> or decline to testify concerning it.<sup>12</sup> And if the usury did not appear upon the face of the contract, the borrower could testify as to its existence in preceding parts

<sup>1</sup> *Heartrunft v. Daniels*, 43 Ill. 369.

<sup>2</sup> *McNeill v. Arnold*, 17 Ark. 154.

<sup>3</sup> *Southard v. Cushing*, 11 B. Mon. (Ky.) 344.

<sup>4</sup> See also *Virgin v. Wingfield*, 54 Ga. 451; *Wilson v. Hanson*, 20 N. H. 375.

<sup>5</sup> *Buchanan v. Buchanan*, 46 Pa. St. 186; *Bank of Alabama v. McDade*, 4 Port. (Ala.) 252.

<sup>6</sup> *St. John v. Amer. Mut. Life Ins. Co.*, 2 Duer (N. Y.) 419. See also *Hoak v. Hoak*, 5 Watts (Pa.) 80.

<sup>7</sup> *Campbell v. Galbreath*, 5 Watts (Pa.) 423.

<sup>8</sup> *Petermans v. Laus*, 6 Leigh (Va.) 523.

<sup>9</sup> *Brolasky v. Miller*, 1 Stock. (N. J.) 807. Compare *Cummins v. Wire*, 2 Halst. (N. J.) 73; *Nichols v. Holgate*, 2 Aik. (Vt.) 138.

<sup>10</sup> *Post v. Dart*, 8 Paige (N. Y.) 639.

<sup>11</sup> *Thomas v. Brown*, 1 McCord (S. C.) 557; *Jones v. Kirksey*, 10 Ala. 579.

<sup>12</sup> *Quarles v. Brannon*, 5 Strobb. (S. C.) 151.

of the transactions;<sup>1</sup> as, that other notes existed which had been cancelled, the consideration of which entered into, and formed a part of, the note in suit.<sup>2</sup> But in an early case it was held that the borrower was not a competent witness to prove that usurious interest was reserved in another State;<sup>3</sup> or, after paying the usury, to testify in a suit to recover it back.<sup>4</sup>

(2) *Lender*. It was held in New York, that where a suit at law is brought upon a usurious note, in the name of an assignee, for the benefit of the usurious lender, such lender cannot be compelled to testify to the usury, at law.<sup>5</sup> In South Carolina, by statute, the lender can be a witness only where the borrower is not a competent witness by the common law;<sup>6</sup> and where the borrower offered to swear to the circumstances of usury, and made a statement of the facts he would swear to, and the plaintiff made himself a witness, it was held that it was not enough that he denied generally the truth of the statement made by the defendant; that he must submit to be examined by the defendant in answer to the facts stated by him.<sup>7</sup>

§ 80. **Vendor and Purchaser of Lands.** — (1) *Vendor*. The decisions upon the competency of parties to a conveyance of land were pretty fully considered in a previous section,<sup>8</sup> but a few cases, most of which were not there referred to, may be worthy of citation here. And first it was pretty well settled that a vendor without warranty,<sup>9</sup> or by quit-claim deed,<sup>10</sup> or whose interest was equally balanced,<sup>11</sup> or merely of a moral, and not a legal nature,<sup>12</sup> or whose title did not come in question even though the purchase-money had not been paid,<sup>13</sup> or who had been released from his covenants as to title,<sup>14</sup>

<sup>1</sup> *Campbell v. McHarg*, 9 Iowa, 354; *Smith v. Coopers*, Id. 376.

<sup>2</sup> *Palmer v. Severance*, 8 Ala. 53. See also *Gordon v. Goodell*, 34 Ill. 429.

<sup>3</sup> *Bazemore v. Wilder*, 10 Ala. 773.

<sup>4</sup> *Lucas v. Spencer*, 27 Ill. 15.

<sup>5</sup> *Beggs v. Butler*, 1 Clark (N. Y.) 517. As to the competency of parties to negotiable paper to prove usury therein, see *supra*, § 66.

<sup>6</sup> *Kecheley v. Cheer*, 4 McCord (S. C.) 307.

<sup>7</sup> *Murden v. Clifford*, 4 McCord (S. C.) 65.

<sup>8</sup> *Supra*, § 59.

<sup>9</sup> *Hyman v. Bailey*, 15 La. Ann. 560; *Johnston v. Eckhart*, 3 Yeates (Pa.) 427.

<sup>10</sup> *Johnson v. Parks*, 10 Cal. 446; *Swisher v. Williams*, Wright (Ohio) 754.

<sup>11</sup> *Garner v. Bridges*, 38 Ala. 276.

<sup>12</sup> *Jones v. Love*, 9 Cal. 68, where the vendor made a parol promise to make good certain boundaries, as represented by him.

<sup>13</sup> *Rowe v. Bradley*, 12 Cal. 226; *Cleavinger v. Reimar*, 3 Watts & S. (Pa.) 486.

<sup>14</sup> *Summers v. Wallace*, 9 Watts (Pa.) 161.



was a competent witness in an action having relation to the land. So, also, the vendor could testify for the vendee, in the latter's action of ejectment, claiming damages accruing while the land was held by the vendor;<sup>1</sup> and this, although he could not be a competent witness to support his vendee's title in an action against him for the premises by a third person.<sup>2</sup> But where both parties claimed under the witness, he was competent;<sup>3</sup> and so was he in a suit between his own creditor and the vendee.<sup>4</sup> Again, the vendor was admitted as a witness to invalidate his own deed, his testimony being clearly against interest;<sup>5</sup> and, conversely, to sustain the deed against the charge of fraud, for fraud in the grantor avoids the deed though the grantee be not affected therewith.<sup>6</sup> The vendor is a competent witness against the vendee, though his declarations would not be evidence against him.<sup>7</sup> He has also been held competent to testify as to a servitude existing at the time of the conveyance, though his testimony be adverse to the vendee.<sup>8</sup> One who signs a deed as attorney may testify for or against it;<sup>9</sup> and one of two attorneys executing a deed may prove the execution of it by himself, but not by his co-attorney, where there is a subscribing witness to the deed.<sup>10</sup>

On the other hand, it was settled that a vendor with warranty was incompetent, as a witness, to sustain the title to the property he had conveyed.<sup>11</sup> Nor could the vendor prove the execution of the deed, in an action of trespass to try title;<sup>12</sup> or the lines of the land sold, if he conveyed it with warranty.<sup>13</sup> So, also, where the sale was attacked as fraud-

<sup>1</sup> *Grady v. Early*, 18 Cal. 108.

<sup>2</sup> *Jackson v. Rice*, 3 Wend. (N. Y.) 180.

<sup>3</sup> *Hill v. Canfield*, 56 Pa. St. 454.

<sup>4</sup> *McKay v. Treadwell*, 8 Tex. 176.

<sup>5</sup> *McFerran v. Powers*, 1 Serg. & R. (Pa.) 102; *Brown v. Downing*, 4 Id. 494; *Barrett v. French*, 1 Conn. 354; *Stevenson v. Chapman*, 12 N. H. 524; *Seymour v. Beach*, 4 Vt. 493.

<sup>6</sup> *Edgell v. Lowell*, 4 Vt. 405; *Warner v. Percy*, 22 Vt. 155. See also *Colgin v. Redman*, 20 Ala. 650.

<sup>7</sup> *Stemmons v. Duncan*, 9 B. Mon. (Ky.) 351.

<sup>8</sup> *Macheca v. Avegno*, 20 La. Ann. 339; *Greenwalt v. Horner*, 6 S. & R.

(Pa.) 71. See also *Blair v. Owles*, 1 Munf. (Va.) 38.

<sup>9</sup> *Alston v. Jones*, 2 Hayw. (N. C.) 298.

<sup>10</sup> *Jackson v. Britton*, 4 Wend. (N. Y.) 507.

<sup>11</sup> *Edwards v. Ballard*, 14 B. Mon. (Ky.) 289; *O'Blennis v. Corri*, 5 La. Ann. 102; *Moore v. McKie*, 5 Sm. & M. (Miss.) 238; *Elliott v. Boren*, 2 Sneed (Tenn.) 662. But compare *Manifee v. Conn*, 2 Bibb (Ky.) 623.

<sup>12</sup> *Barry v. Wilbourne*, 2 Bail. (S. C.) 91.

<sup>13</sup> *Moon v. Campbell*, 1 Munf. (Va.) 600.

ulent as against creditors, he could not testify for the creditors,<sup>1</sup> or for the vendee, the witness having taken security for the purchase-money.<sup>2</sup> Again, where the vendee is sued in ejectment, the vendor cannot testify for the plaintiff, especially when, by avoiding the deed, the recovery of the plaintiff would inure to the common benefit of the plaintiff and the witness. The rule is that no one but the party to a deed, who alleges the fraud to have been practised upon him, or those claiming title under him, will be allowed to impeach or avoid the deed on that ground.<sup>3</sup> The witness cannot show what his supposition was at the time he executed the deed, in order to invalidate it, unless such supposition was grounded on the fraudulent representations of the other party.<sup>4</sup>

(2) *Vendee*. A vendee without interest in the event of the suit was competent in an action between his vendor and a third person.<sup>5</sup> If he had sold the land, he could testify for his vendor in a proceeding by the latter against the purchaser to enforce the vendor's lien, to show notice of such lien to the purchaser.<sup>6</sup> And if it appeared that his vendor had no title, he could prove the amount of rents and profits received by the vendor, and improvements made by him.<sup>7</sup> Or, the sale being attacked as a fraud upon the vendor's creditors, he could testify as to his intention in making the purchase, and that the entire proceeds of the sale were immediately applied in payment of the debts of the vendor.<sup>8</sup>

But the vendor being dead, the vendee was held not competent to prove that a conveyance by the deceased was made on a secret trust that the grantee should pay his debts, as a fund is thus provided for the payment of debts, and his own purchase so far exonerated.<sup>9</sup> And he was also held incompetent in ejectment by his vendor against the purchaser of the land at a sale on execution as the property of the witness, to enforce payment of the purchase-money.<sup>10</sup>

<sup>1</sup> *Bushnell v. City &c. Bank*, 20 La. Ann. 464; *Smead v. Williamson*, 16 B. Mon. (Ky.) 492.

<sup>2</sup> *Pope v. Andrews*, 1 Sm. & M. (Miss.) Ch. 135.

<sup>3</sup> *Jackson v. Eaton*, 20 Johns. (N.Y.) 478.

<sup>4</sup> *Ogden v. Peters*, 15 Barb. (N.Y.) 560.

<sup>5</sup> *Town v. Wood*, 37 Ill. 512.

<sup>6</sup> *Ringgold v. Bryan*, 3 Md. Ch. 488. See also *Hill v. McLean*, 10 Lea (Tenn.) 107. But compare *Messenger v. Armstrong*, 19 Ohio, 41.

<sup>7</sup> *Hogan v. Stone*, 1 Ala. 496.

<sup>8</sup> *Bedell v. Chase*, 34 N.Y. 386.

<sup>9</sup> *Clagett v. Hall*, 9 Gill. & J. (Md.) 80.

<sup>10</sup> *Jones v. Patterson*, 1 Watts & S. (Pa.) 321.

§ 81. **Vendor and Purchaser of Personal Property.** — (1) *Vendor.* It was pretty well settled that a seller of personal property without recourse against him in case the title proved defective, was a competent witness for the purchaser.<sup>1</sup> So was he where he was released from his warranty of title, in a contest between the purchaser and creditors of the witness, who attacked the sale as fraudulent.<sup>2</sup> The mere fact that the property sold was not in the possession of the witness at the time of the sale did not disqualify him as a witness for the purchaser.<sup>3</sup> He could uphold his sale in the purchaser's action against the sheriff for attaching the goods sold as the property of the witness,<sup>4</sup> or against any person alleging a title hostile to the purchaser, or detaining the goods from him,<sup>5</sup> or who converted the same.<sup>6</sup>

Where both parties claimed under the witness,<sup>7</sup> the latter having sold the property to both of them,<sup>8</sup> the interest of the witness being equally balanced, he was competent for either party; and such was held to be the case where the suit was between the purchaser and an attaching creditor of the witness.<sup>9</sup>

In several cases the vendor was held competent to prove that he had no title, even though he had given a bill of sale of the property, and had sold with warranty of title, the contest being trover brought by a third person against the vendee.<sup>10</sup>

On the other hand, the more prevalent rule was that the

<sup>1</sup> *Mahone v. Yancey*, 14 Ala. 395; *Connelly v. Chiles*, 2 A. K. Marsh. (Ky.) 242; *Finlay v. Humble*, Id. 569; *Cannon v. White*, 16 La. Ann. 85. See also *McInroy v. Dyer*, 47 Pa. St. 118.

<sup>2</sup> *Cadbury v. Nolen*, 5 Pa. St. 320.

<sup>3</sup> *Lackey v. Stouder*, 2 Ind. 376.

<sup>4</sup> *Zackowski v. Jones*, 20 Ala. 189; *Sawyer v. Ware*, 36 Ala. 675; *Coghill v. Boring*, 15 Cal. 213; *Sherron v. Humphreys*, 2 Green (N. J.) 217; *Graham v. McCreary*, 40 Pa. St. 515; *Cox v. Hall*, 18 Vt. 191. S. P. *Goodrich v. Hanson*, 33 Ill. 498.

<sup>5</sup> *Ellis v. Ellis*, 1 Mo. 220; *Hendricks v. Mount*, 2 South. (N. J.) 738. But see *infra*.

<sup>6</sup> *Crosby v. Nichols*, 3 Bosw. (N. Y.)

450; *Waller v. Parker*, 5 Coldw. (Tenn.) 476.

<sup>7</sup> *Miller v. Fitch*, 7 Watts & S. (Pa.) 366. But see *Wright v. Bonta*, 19 Tex. 385.

<sup>8</sup> *Jones v. Park*, 1 Stew. (Ala.) 419; *Butler v. Tufts*, 13 Me. 302; *Morrison v. Fowler*, 18 Me. 402; *Frost v. Hill*, 3 Wend. (N. Y.) 386. But compare *McCabe v. Morehead*, 1 Watts & S. (Pa.) 513.

<sup>9</sup> *Warner v. Carleton*, 22 Ill. 415; *Nichols v. Patten*, 18 Me. 231; *Ward v. Chase*, 35 Me. 515.

<sup>10</sup> *Martin v. Kelly*, 1 Stew. (Ala.) 198; *Dickinson v. Dickinson*, 9 Metc. (Mass.) 471. S. P. *Clinton v. Estes*, 20 Ark. 216; *Shropshire v. Shropshire*, 7 Yerg. (Tenn.) 165.

seller of chattels could not be a witness for the buyer in an action involving the title to the property;<sup>1</sup> and this was so in trover against the buyer, where the value as well as the title was in question, even though the witness was so situated as to be liable to the plaintiff if the sale were unauthorized, as well as to the defendant on the warranty of title; such witness having a pecuniary motive for undervaluing the property by his testimony.<sup>2</sup> And numerous decisions denied the seller's competency for his creditors, to impeach the sale, or to prove it fraudulent, in a contest respecting it, between his creditors and the buyer.<sup>3</sup> The seller could not prove title in the buyer unless released by the latter;<sup>4</sup> or testify as to the soundness of the chattel (a slave) whose soundness he had warranted.<sup>5</sup> The subject-matter being a *chose in action*, the vendor could not by any sale of his claim, or by any other means whatever, make himself a competent witness to support it.<sup>6</sup>

(2) *Purchaser*. In a suit by the vendor against one who guaranteed the payment by the purchaser, the latter was held a competent witness for the plaintiff.<sup>7</sup> And so was he to show a right of possession in the seller, in the latter's suit in replevin against a third person;<sup>8</sup> and the rule was the same where the form of action was trespass,<sup>9</sup> or trover,<sup>10</sup> especially if the contract of purchase had been rescinded.<sup>11</sup>

<sup>1</sup> *Lindsay v. Lamb*, 24 Ark. 222; *Dunham v. Williams*, Id. 264; *Arnold v. McNeill*, 17 Id. 179; *Bennett v. Quick*, 13 La. Ann. 547; *Hale v. Smith*, 6 Me. 416; *Thompson v. Towle*, 32 Me. 87; *Heskett v. Borden Mining Co.*, 10 Md. 179; *Whitney v. Heywood*, 6 Cush. (Mass.) 82; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Wetmore v. Click*, 5 Jones (N. C.) L. 155; *Saunders v. Addis*, 1 Bail. (S. C.) 49; *Parker v. Hammond*, 13 Vt. 242. But see *Dickerson v. Johnson*, 24 Ark. 251; *Fister & Beall*, 1 Har. & J. (Md.) 31.

<sup>2</sup> *Fuller v. Townsend*, 5 Den. (N. Y.) 184.

<sup>3</sup> *Waugenheim v. Childs*, 23 Cal. 444; *Bailey v. Foster*, 9 Pick. (Mass.) 139; *Rea v. Smith*, 19 Wend. (N. Y.) 293; *Gardenier v. Tubbs*, 21 Id. 169. But see *Howe v. Scannell*, 8 Cal. 325.

<sup>4</sup> *Freeman v. Lewis*, 5 Ired. (N. C.) L. 91.

<sup>5</sup> *Burke v. Clarke*, 2 Swan (Tenn.) 310.

<sup>6</sup> *Hottenstein's appeal*, 2 Grant (Pa.) Cas. 301; *Swanzey v. Parker*, 50 Pa. St. 441.

<sup>7</sup> *Smith v. Bainbridge*, 6 Blackf. (Ind.) 12.

<sup>8</sup> *Mumma v. McKee*, 10 Iowa, 107. Compare *Ratliffe v. Sangston*, 18 Md. 383; *Cutter v. Rathbun*, 3 Hill (N. Y.) 577.

<sup>9</sup> *Chamberlain v. Smith*, 44 Pa. St. 431.

<sup>10</sup> *Downs v. Belden*, 46 Vt. 674.

<sup>11</sup> *Stafford v. Ames*, 9 Pa. St. 343; *Babcock v. Huntington*, 9 Ala. 869. See further as to the competency of the buyer in special cases, *Loud v. Pierce*, 25 Me. 233; *Edwards v. Currier*, 43 Me. 474; *Kingsbury v. Smith*, 13 N. H. 109; *Seymour v. Wilson*, 14 N. Y. 567; *Turley v. Brewster*, 33 Tex. 188.

§ 82. **Warrantors.** — Most of the decisions on this subject have already been examined,<sup>1</sup> and we have seen that the common law generally excluded from the witness-box the warrantor of property, whether real or personal, when called by the vendee or grantee, in an action involving the title to such property.<sup>2</sup> Even a remote warrantor, where there had been several conveyances of the same land with warranty, was not allowed to support the title in ejectment, his liability on his warranty still existing.<sup>3</sup> But where the validity of the title could not be affected by the event of the suit, the warrantor was not interested, and hence competent.<sup>4</sup> Where the warranty was that a horse sold by the witness to the defendant was sound, the warrantor was allowed to prove his soundness in an action against the defendant on a similar warranty.<sup>5</sup>

Where the witness was called to *impeach* the title he had warranted, the rule of exclusion did not apply, his testimony, in such a case, being against interest.<sup>6</sup> In sales by private individuals in their own right, of property in possession, the warranty of title was implied, and no express contract had to be shown in order to exclude the warrantor from testifying;<sup>7</sup> but no such implied warranty arose in the case of sales by sheriffs, personal representatives, or other trustees, except to the extent of their having no knowledge of any defect in their title or right to sell in their representative characters, and therefore they were generally held competent.<sup>8</sup>

<sup>1</sup> *Supra*, §§ 52, 59, 80, 81.

<sup>2</sup> *McCarron v. Cassidy*, 18 Ark. 34; *Meek v. Walthall*, 20 Ark. 648.

<sup>3</sup> *Lawrence v. Senter*, 4 Sneed (Tenn.) 52. In Louisiana he must have been cited in warranty in the suit in which he was called to testify, or the objection of interest would not exclude him. *Arrowsmith v. Durell*, 14 La. Ann. 849.

<sup>4</sup> *Laftin v. Nally*, 24 Tex. 565.

<sup>5</sup> *Mulvany v. Rosenberger*, 18 Pa. St. 203.

<sup>6</sup> *Robb v. Lefevre*, 7 Iowa, 150; *Tuttle v. Turner*, 28 Tex. 759.

<sup>7</sup> *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Hale v. Smith*, 6 Me. 416; *Baxter v. Graham*, 5 Watts (Pa.) 418.

<sup>8</sup> *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176; *Petermans v. Laws*, 6 Leigh (Va.) 523, 529. And see *supra*, §§ 68, 72, 78.

## CHAPTER VII.

### RESTORATION TO COMPETENCY BY RELEASE OR ASSIGNMENT OF INTEREST, PAYMENT, OR OTHER DIVESTMENT OF INTEREST.

- § 83. Release of Interest, generally.
- § 84. Who may give a Release.
- § 85. When the Court may release.
- § 86. Time to execute Release.
- § 87. What Interests are, and what are not removed.
- § 88. What is a Good and Sufficient Release.
- § 89. Assignment or Transfer of Interest.
- § 90. Divestment of Interest by Payment.
- § 91. ——— by Disclaimer of Title.
- § 92. ——— by Judgment for or against the Witness.
- § 93. Effect of Indemnifying the Witness.
- § 94. Other Modes of restoring Competency.
- § 95. Necessity of Seal; Assent; Delivery.
- § 96. Proof of Release; Objections, etc.

§ 83. **Release of Interest, generally.** — The disqualification of interest may always be removed and the competency of a witness restored by a proper and complete release.<sup>1</sup> If the interest be a vested one in the witness himself, he may divest himself of it, by a release or other proper conveyance; if it consist in a liability over, whether to the party calling him, or to another person, it may be released by the person to whom he is liable.<sup>2</sup> Thus the release by a member of a corporation of his interest in it renders him a competent witness for the corporation.<sup>3</sup> It is reversible error to reject a witness who has released, by deed, all his interest in the suit in which he is called to testify.<sup>4</sup> Thus a devisee who has released his interest is a competent witness for the trustee appointed by the will.<sup>5</sup> Such a witness is placed, by the release of his interest, on the same footing with other witnesses, and is not confined to any particular point;<sup>6</sup> and

<sup>1</sup> Ayres v. Campbell, 3 Iowa, 582; Robbins v. Butler, 24 Ill. 387; Gillespie v. Gillespie, 2 Bibb (Ky.) 89; Evans v. Hays, 2 Mo. 97; Patterson v. Fay, 1 Phil. (Pa.) 473.

<sup>2</sup> 1 Greenl. Ev. (14 ed.) § 426.

<sup>3</sup> Smith v. Natchez Steamboat Co., 2 Miss. (1 How.) 479.

<sup>4</sup> Fairly v. Fairly, 38 Miss. 280.

<sup>5</sup> Cook v. Grant, 16 S. & R. (Pa.) 198.

<sup>6</sup> Luyten v. Haygood, 2 Bay (S. C.) 177; Carroll v. M'Whorter, Id. 463.

it is for the jury to judge of the degree of credit to which he is entitled.<sup>1</sup> If the action is instituted for the recovery of a penalty, the witness becomes competent on releasing his interest in the penalty to the plaintiff.<sup>2</sup> A witness legally released is competent, though prior to the trial he had been heard to say that he felt himself bound to re-imburse the plaintiff in case he failed to recover: the moral obligation will not disqualify him.<sup>3</sup> And one of several plaintiffs is a competent witness for the defendant, when fully released from all interest and willing to testify, though others object who are interested on the part of the plaintiffs.<sup>4</sup>

§ 84. **Who may give a Release.** — Generally, the interest of a witness in a suit may be released by the party proposing to examine him;<sup>5</sup> but not by the attorney for the party with whom his interest lies, in the absence of special authority in the attorney, from his client, for that purpose.<sup>6</sup> The release must be given by the party holding the interest to be released, or his duly authorized agent in that behalf.<sup>7</sup> Where several parties hold such interest *jointly*, a release by one binds all.<sup>8</sup> Thus a release by one of several obligees in a bond sued on, or to one of several obligors, will operate as to all;<sup>9</sup> and the same is true as to a release by one of two or more partners in a joint adventure,<sup>10</sup> or two or more joint proprietors or owners.<sup>11</sup> But a release by one of two or more parties to the record, whose interests are *several*, will not restore the competency of the witness.<sup>12</sup>

<sup>1</sup> Kinloch v. Palmer, 1 Mill (S. C.) Const. 216.

<sup>2</sup> City Council v. England, Riley (S. C.) 50.

<sup>3</sup> Stimmel v. Underwood, 3 Gill & J. (Md.) 282.

<sup>4</sup> Wills v. Judd, 26 Vt. 617.

<sup>5</sup> Richardson v. Carey, 2 Rand. (Va.) 87.

<sup>6</sup> McCurdy v. Terry, 33 Ga. 49; Murray v. House, 11 Johns. (N. Y.) 464; Walker v. Ferrin, 4 Vt. 523.

<sup>7</sup> See Pollard v. Graves, 23 Pick. (Mass.) 86; Wise v. Patterson, 3 Greene (Iowa) 471; Crooker v. Jewell, 29 Me. 527. Where releases are necessary to render a witness competent, they are insufficient, unless moving from all the parties interested on

the record. Ingram v. Smith, 1 Head (Tenn.) 411.

<sup>8</sup> Haley v. Godfrey, 16 Me. 305.

<sup>9</sup> Cheetham v. Ward, 1 Bos. & P. 630; Bayley v. Lloyd, 7 Mod. 250; Co. Litt. 232, u.

<sup>10</sup> Perlberg v. Gorham, 10 Cal. 120; Bulkley v. Dayton, 14 Johns. (N. Y.) 387. But see Simons v. Smith, Ry. & Moo. N. P. 29; Cheyne v. Koops, 4 Esp. 112.

<sup>11</sup> Whitmore v. Waterhouse, 4 Car. & P. 383; Hockless v. Mitchell, 4 Esp. 86.

<sup>12</sup> Belts v. Jones, 9 Car. & P. 199. And it has been held that one of several plaintiffs cannot release his co-plaintiffs from liability to costs, so as to render them disinterested witnesses.

It has been held, that an assignee for creditors, himself a creditor, could release to the debtor all his interest in the fund, and thus become a competent witness;<sup>1</sup> and that a husband, sued in ejectment for real estate belonging to his wife, could release a witness objected to as incompetent on the ground of his liability to the wife under a covenant for quiet enjoyment.<sup>2</sup> So, also, a remainder-man could release his interest to the owner of the life-estate, and thereby render himself a competent witness for the latter in a suit for injury to the property.<sup>3</sup>

A surety may always release the principal, so as to render the latter a competent witness.<sup>4</sup> Even an infant may execute a sufficient release, for it is voidable, not void, and a stranger will not be heard to object to it;<sup>5</sup> but his guardian *ad litem* or *prochein ami* cannot, as he has no implied authority so to do.<sup>6</sup>

§ 85. **When the Court may release.**—Where a material witness for a party is a surety on a bond given by such party, the court may, in a proper case, allow another surety to be substituted, so as to render the witness competent.<sup>7</sup> So it was held in the case of a surety on a replevin bond, whose testimony was material for the plaintiff,<sup>8</sup> and in the case of a defendant's bail.<sup>9</sup> But it has been held that such a course should not be taken where the bond was given on appeal, or on the allowance of an injunction, or in an action of detainue, but that the bond should be cancelled and a new one given.<sup>10</sup> And the court has discretionary power to per-

Roselius v. Barrelli, 16 La. Ann. 386. And where a common right of fishery existed in all the inhabitants of a place, a release, by one of them, of all his interest in the right, to any person whatever, was held inoperative (such interest being a personal right not assignable), and not to render him a competent witness to prove such common right. Jacobson v. Fountain, 2 Johns. (N. Y.) 170.

<sup>1</sup> Main v. Newson, Anth. (N. Y.) 11.

<sup>2</sup> Ford v. Walsworth, 19 Wend. (N. Y.) 334.

<sup>3</sup> Clark v. Southern & C. R. R. Co., 27 Tex. 100.

<sup>4</sup> *Supra*, § 74.

<sup>5</sup> Rogers v. Berry, 10 Johns. (N. Y.) 132; Walker v. Ferrin, 4 Vt. 523.

<sup>6</sup> Fraser v. Marsh, 2 Stark. N. P. 41; Walker v. Ferrin, *supra*. But see Hanly v. Sprague, 20 Me. 431.

<sup>7</sup> Dudley v. Love, 35 Ga. 148.

<sup>8</sup> Brewer v. Murray, 7 Blackf. (Ind.) 567; Bailey v. Bailey, 1 Bing. 92.

<sup>9</sup> Irwin v. Caryell, 8 Johns. (N. Y.) 407; Baillie v. Hale, 1 Moo. & M. 289. See *supra*, § 54.

<sup>10</sup> Artz v. Grove, 21 Md. 456; Webb v. Kelly, 37 Ala. 333; s.c., Ala. Sel. Cas. 349; Pomeroy v. Avery, 9 Paige (N. Y.) 591. In Arts v. Grove, *supra*, it is said that such a power may be very convenient, but it impairs the obligation of contracts, and violates the organic law. See also Drinkwater v. Holliday, 11 Ala. 134; Spann v. Brown, Riley (S. C.) 177.



mit a party to give a new bond for costs, for the purpose of using the surety in the old one, as a witness, after witnesses have been examined on the trial.<sup>1</sup> So, also, the court may suffer the *prochein ami* of an infant plaintiff to be changed, and the first friend, being thereby released from responsibility for costs, is a competent witness for the plaintiff.<sup>2</sup>

But, it would seem, that a commissioner or referee, to whom it is referred to ascertain and state the facts in the case, has not power to discharge one of the defendants and make him a witness for the others.<sup>3</sup> And in a criminal case, it has been decided that the court cannot discharge one of the defendants from the indictment, in order to enable him to testify, unless all the following facts concur: viz., a joint indictment, a joint trial, and an application on the part of the district attorney that the defendant be discharged, to be used as a witness for the people, before he has gone into his defence.<sup>4</sup>

§ 86. **Time to execute the Release.** — A witness who becomes interested after the suit is brought, but divests himself thereof before trial, is competent,<sup>5</sup> even though he was part-owner of the contract in suit, shortly after it was made, and up to the day of the trial.<sup>6</sup> The release may be executed at and during the trial;<sup>7</sup> and the court cannot refuse to give it full effect because so given.<sup>8</sup> If the witness has been examined in chief, before his interest is discovered, it may then be removed by a release, and the witness re-examined;<sup>9</sup> but in such a case the credibility of the witness will be greatly impaired.<sup>10</sup> So, also, an interested witness who has been examined on a former trial, without being released, may be rendered competent on the subsequent trial by a release,

<sup>1</sup> *Matthews v. Coalter*, 9 Mo. 705.

<sup>2</sup> *Burks v. Shain*, 2 Bibb (Ky.) 341; *Helms v. Franciscus*, 2 Bland (Md.) 544.

<sup>3</sup> *Dole v. Erskine*, 35 N. H. 503.

<sup>4</sup> *People v. Bruzzo*, 24 Cal. 41. See also *supra*, §§ 42, 43.

<sup>5</sup> *Orphan's Court v. Woodburn*, 7 Watts & S. (Pa.) 162.

<sup>6</sup> *Moore v. Rich*, 12 Vt. 563; *Fletcher v. Cole*, 26 Vt. 170.

<sup>7</sup> *Pegg v. Warford*, 7 Md. 582.

<sup>8</sup> *Barnes v. Ball*, 1 Mass. 73.

<sup>9</sup> *National &c. Ins. Co. v. Crane*, 16 Md. 260; *Tallman v. Dutcher*, 7 Wend. (N. Y.) 180; *Neville v. Demeritt*, 1 Gr. (N. J.) Eq. 321. But it has been held that a release made after the witness' testimony has been given, does not legalize such testimony. *Wynn v. Williams, Minor* (Ala.) 136; *Ten Eyck v. Bill*, 5 Wend. (N. Y.) 55. Because he was interested at the time he testified. *Kimball v. Gearhart*, 12 Cal. 27.

<sup>10</sup> *Steele v. Payne*, 2 A. K. Marsh. (Ky.) 187; *Barnes v. Ball*, *supra*.

and the objection will only go to his credit.<sup>1</sup> Generally speaking, the release should be given before trial, or at all events, before the testimony is closed; but where the defendant suffered an interested witness to be examined, on the undertaking of plaintiff's attorney to execute a release to him after the trial, and, the plaintiff having obtained a verdict, failed to execute the release, a new trial was refused the defendant, but the witness was allowed his remedy on the undertaking.<sup>2</sup>

§ 87. **What Interests are, and what are not removed.** — As a general rule, subject to some exceptions to be presently considered, all disqualifying interests may be removed by a proper release; and this, whether the proposed witness has a sole, individual interest, or is jointly interested with others. Thus, one who is individually interested in a distributive share of a fund sought to be recovered, may, for a nominal consideration, release his interest for the express purpose of becoming a witness.<sup>3</sup> And one who is interested as a member of a firm,<sup>4</sup> or as a joint-contractor with others,<sup>5</sup> or a joint-debtor,<sup>6</sup> may be restored to competency by the giving or receiving a release, as the nature of the interest may require.

But there are some interests which, owing to their peculiar character, cannot be reached by a release, though doubtless removable in some other manner.<sup>7</sup> Among these are the right of an inhabitant of a town in common with others; for a release by him to the other inhabitants will not render him competent to testify for one of them in an action founded on the common right.<sup>8</sup> And a legatee, distributee, or heir, who releases his interest in the particular suit or debt sued for, does not become competent, if the proceeds of the re-

<sup>1</sup> *Jones v. Raine*, 4 Rand. (Va.) 386. See also *Wake v. Lock*, 5 Car. & P. 454; *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

<sup>2</sup> *Heming v. English*, 1 Crompt. M. & R. 568.

<sup>3</sup> *Carter v. Trueman*, 7 Pa. St. 315. But a distributee is not made a competent witness by release of all his interest in a particular demand, sought to be recovered by the administrator. *Kennedy v. Conn*, 3 B. Mon. (Ky.) 321. Compare *Dunbar v. Chevalier*, 28 Miss. 161.

<sup>4</sup> *Linsley v. Lovely*, 26 Vt. 123; *Ward v. Lee*, 13 Wend. (N. Y.) 41; *Lefferts v. DeMott*, 21 Wend. (N. Y.) 136.

<sup>5</sup> *Smith v. Allen*, 18 Johns. (N. Y.) 245; *Duke v. Pownall*, 1 Moo. & Malk. 430.

<sup>6</sup> *Bagley v. Osborn*, 2 Wend. (N. Y.) 527. But see *Bank of Utica v. Mersereau*, 3 Barb. (N. Y.) Ch. 528.

<sup>7</sup> See *infra*, §§ 89-94.

<sup>8</sup> *Abby v. Goodrich*, 3 Day (Conn.) 433; *Jacobson v. Fountain*, 2 Johns. (N. Y.) 170.

covery would go to increase the assets of the estate.<sup>1</sup> So, also, in an action for land, and damages for its detention, a defendant who has released to his co-defendants may yet be interested in the damages for the detention, and therefore incompetent.<sup>2</sup> And the covenantee in a real covenant, running with the land, cannot release the covenantor after he has parted with the estate, so as to render him competent: no one but the present owner can release the covenant.<sup>3</sup> Again, a release by an insolvent debtor of his claim to the surplus of his estate does not render him competent in a suit in behalf of the assignee in insolvency, as such.<sup>4</sup>

So, also, one of the contestants against a will, who is a party to the suit, and as such liable for costs, is an incompetent witness to defeat the probate of the will, even though he should release all his distributive interest in the estate.<sup>5</sup> And a joint-defendant, upon being released from liability to certain parties, cannot be permitted to testify that a judgment is dormant, as the result would be the release of all parties from liability on the judgment, and he would, therefore, be interested.<sup>6</sup> Again, an owner of a vessel at the time of a collision, and when suit was commenced and the boat attached, who sold his interest with the understanding that the purchasers should run the risk of the suit then pending, was held incompetent to testify.<sup>7</sup> And on the trial of a *sci. fa.*, on a mechanic's lien filed against a reputed owner and two contractors, such owner and one contractor cannot make the other a competent witness by a release, as they have no power to release him from his liability to the plaintiff's costs.<sup>8</sup>

In view of the general abolition of interest in the event, as a disqualification, no further examples of interests, which, at common law, were beyond the reach of a release, need be

<sup>1</sup> Maury v. Mason, 8 Port. (Ala.) 211; Powell v. Powell, 7 Ala. 582. See also Montgomery v. Grant, 57 Pa. St. 248; Rowt v. Kile, Gilm. (Va.) 202.

<sup>2</sup> Dearmond v. Dearmond, 10 Ind. 191.

<sup>3</sup> Leighton v. Perkins, 2 N. H. 427; Pile v. Benham, 3 Hayw. (Tenn.) 176; Sherwood v. Hubbel, 1 Root (Conn.) 498.

<sup>4</sup> Wilkinson v. Pittsburg Farmers' &c. Turnpike Co., 6 Pa. St. 398; Bittir v. Keys, 2 Id. 459. Compare Perryman v. Steggall, 8 Bing. 369.

<sup>5</sup> Taylor v. Kelly, 31 Ala. 59.

<sup>6</sup> Neal v. Lamar, 18 Ga. 746.

<sup>7</sup> Patrick v. The J. Q. Adams, 19 Mo. 73.

<sup>8</sup> Haworth v. Wallace, 14 Pa. St. 118.

given; but the reader who desires to further investigate the subject is referred to the authorities collated in the note.<sup>1</sup>

§ 88. **What is a Good and Sufficient Release.** — It is pretty well settled that a general release of all actions, and causes of action, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability dependent upon the event of the suit in which he is called to testify, touching his conduct in the matters on which the suit is founded.<sup>2</sup> Therefore, such a release from the drawer to the acceptor of a bill, was held to render the acceptor a good witness for the drawer, in an action by payee against drawer, the suit being pending when the release was given.<sup>3</sup> So, also, the written consent of the counsel for one party that the next friend or surety on appeal

<sup>1</sup> *Assignor of subject of suit.* Smith v. Newton, 38 Ill. 230.

*Bankrupt or insolvent.* Barnes v. Billington, 1 Wash. (U. S.) 29; Glenn v. Van Kapef, 2 Gill & J. (Md.) 132; Steele v. Phoenix Ins. Co., 3 Binn. (Pa.) 306.

*Execution debtor.* Gray v. Morey, 26 Ill. 409; Knerr v. Hoffman, 65 Pa. St. 126; Seymour v. Beach, 4 Vt. 493.

*Grantor or grantee.* Paige v. O'Neal, 12 Cal. 483; Clark v. Johnson, 5 Day (Conn.) 373; Fash v. Blake, 38 Ill. 363; Taylor v. Whiting, 2 B. Mon. (Ky.) 268; Gilbert v. Curtis, 37 Me. 45; Fatheree v. Fletcher, 31 Miss. 265; Cunningham v. Knight, 1 Barb. (N. Y.) 399; Falls v. Carpenter, 1 Dev. & B. (N. C.) Eq. 237; Buie v. Wooten, 7 Jones (N. C.) L. 441.

*Distributee or legatee.* Robinson v. Tipton, 31 Ala. 595; Martin v. Mitchell, 28 Ga. 382; Wampler v. Wampler, 9 Md. 540.

*Husband or wife.* Woods v. Williams, 9 Johns. (N. Y.) 123; Mishler v. Merkle, 10 Pa. St. 509; Sheer v. Austin, 2 Rich. (S. C.) 330. See also *infra*, Chap. X.

*Landlord or tenant.* Vincent v. Huff, 4 S. & R. (Pa.) 298.

*Master or crew.* The Peytona, 2 Curt. (U. S.) 21; Weaver v. Alabama & Co., 35 Ala. 176; Arnold v. Anderson, 2 Yeates (Pa.) 93.

*Mortgagor.* Little v. Riley, 43 N. H. 109; McLaren v. Hopkins, 1 Paige (N. Y.) 18; Bardwell v. Howe, 1 Clark (N. Y.) 281.

*Parties to negotiable paper.* Gould v. Tatum, 21 Ark. 329; Pendleton v. Speed, 2 J. J. Marsh. (Ky.) 508; Hankerson v. Emery, 37 Me. 16; Purvis v. Albritton, 4 Jones (N. C.) L. 170; Dogan v. Ashby, 1 Strobb. (S. C.) 433; Shackelford v. Wheeler, 7 Tex. 553.

*Partners.* LeRoy v. Johnson, 2 Pet. (U. S.) 186; Bill v. Porter, 9 Conn. 23; Dougherty v. Smith, 4 Metc. (Ky.) 279; Rhoads v. Armstrong, 41 Pa. St. 92.

*Principal or surety.* Bank of Lime-stone v. Penick, 2 T. B. Mon. (Ky.) 98; Church v. Dickinson College, 3 Watts & S. (Pa.) 221; Hutchinson v. Pettes, 18 Vt. 614; Austin v. Dorwin, 21 Vt. 38.

*Servants.* Rich v. Jones, 9 Cush. (Mass.) 329; Horne v. Memphis & R. R. Co., 1 Coldw. (Tenn.) 72; Stevens v. Colby, 46 N. H. 163.

*Trustees.* Wade v. Lynch, 21 Md. 534; Ferriday v. Selser, 4 How. (Miss.) 506.

<sup>2</sup> Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16; Bond v. Carter, 14 Ga. 697.

<sup>3</sup> Scott v. Lifford, 1 Campb. 249, 250; Cartwright v. Williams, 2 Stark. 340.

of the other party, should be examined as witnesses, as fully as if not parties, prevents the necessity of a motion for their discharge, to make them witnesses, and precludes any attack upon their credibility as parties.<sup>1</sup> And a formal release from any liability over to the party examining the witness, annexed to the interrogatories and transmitted with the commission under which he was examined, is sufficient to remove the objection to his testimony on the score of interest.<sup>2</sup> It makes no difference that the release was obtained for the express purpose of restoring the competency of the witness.<sup>3</sup>

Again, a release of a personal warranty is good without registration, on the trial of an ejectment by the vendee.<sup>4</sup> A covenant not to sue has been held a good release;<sup>5</sup> but a covenant to relieve a co-obligor against a judgment which might be obtained against all the obligors was held not to be;<sup>6</sup> and so of an agreement by the plaintiff in a suit on a promissory note against the maker and indorsers, not to take judgment against the last indorser unless he recovered against all.<sup>7</sup> The general rule was that to remove the interest of the witness, he must be released from all liability for costs, for the money recovered, and from all claims in discharge of which the money recovered in the suit would go.<sup>8</sup> A writing was necessary, a parol release would not do.<sup>9</sup>

§ 89. **Assignment or Transfer of Interest.**—It was well settled even at common law, that one whose testimony was desired in an action might lawfully transfer all his interest in property which was about to become the subject of such action for the purpose of making himself a witness; and, while his

<sup>1</sup> Varner v. Goldsby, 22 Ga. 302.

<sup>2</sup> Farwell v. Harris, 12 La. Ann. 50.

<sup>3</sup> Mott v. Small, 20 Wend. (N. Y.) 212; 22 Id. 403. In equity the examination of a defendant as a witness, by the plaintiff, is an equitable release of such defendant, as to the subject-matter of his testimony. Lewis v. Owen, 1 Ired. (N. C.) Eq. 290; Burton v. Stamper, 6 Id. 14.

<sup>4</sup> Pile v. Benham, 3 Hayw. (Tenn.) 176.

<sup>5</sup> Waggener v. Dyer, 11 Leigh (Va.) 384.

<sup>6</sup> Brown v. Johnson, 13 Gratt. (Va.) 644.

<sup>7</sup> Hogshead v. Baylor, 16 Gratt. (Va.) 99.

<sup>8</sup> Wills v. Judd, 26 Vt. 617. Thus a witness who had received a release, but who, upon being asked if he did not expect to pay the judgment and expenses, provided the plaintiff recovered, replied, "I certainly do," was held incompetent to testify for the defendant. Skillenger v. Bolt, 1 Conn. 147. See also M'Causland v. Neal, 3 Stew. & P. (Ala.) 131; Towns v. Alford, 2 Ala. 378; Bulkly v. Dayton, 14 Johns. (N. Y.) 387; Boardman v. Roger, 17 Vt. 589.

<sup>9</sup> Richardson v. Bartley, 2 B. Mon. (Ky.) 328. See also Kennon v. McRae, 2 Port. (Ala.) 389.

testimony was to be carefully and perhaps suspiciously scrutinized, such testimony was still to be judged of by the ordinary rules which govern in the law of evidence, and to be credited or discredited accordingly.<sup>1</sup> Therefore, a plaintiff in a suit, who had assigned all his interest in the event of it, could be a witness, the costs of the suit having been paid, or such an amount deposited with the proper officer, by the assignee, as would discharge the same.<sup>2</sup> If the party had parted with his interest at the time of the trial, he was competent;<sup>3</sup> and the fact that the transfer was without recourse did not alter the case.<sup>4</sup> An assignment without warranty was deemed as effectual to divest the witness' interest as a formal release of interest would be.<sup>5</sup>

But it was held that one interested in a *chose in action* at the time of its origin could not, by assigning his interest to a mere volunteer, become a competent witness for the assignee as to matters which preceded the assignment.<sup>6</sup> And a merely colorable assignment made for the purpose of enabling a party who should be the plaintiff on the record, to testify, did not divest his interest so as to render the assignor competent.<sup>7</sup>

§ 90. **Divestment of Interest by Payment.** — It was held at a comparatively early period that one who was collaterally interested in the event of a suit, in any given amount, so as to render him incompetent as a witness, could be restored to competency by the payment of the amount of his liability.<sup>8</sup> Such payment, of course, removed all the interest of the witness. So, where a principal filed a bill to enjoin an action

<sup>1</sup> Tobey v. Leonards, 2 Wall. (U. S.) 423.

<sup>2</sup> Willings v. Consequa, Pet. C. Ct. 301. S. P. Smith v. Bell, 35 Ga. 238. But see Clement v. Bixler, 3 Watts (Pa.) 248; M'Lughan v. Bovard, 4 Id. 308; Tilley v. State, 21 Tex. 200.

<sup>3</sup> Central R. R. & Co. v. Hines, 19 Ga. 203; Henderson v. Crouse, 7 Jones (N. C.) L. 623.

<sup>4</sup> Blackerby v. Holton, 5 Dana (Ky) 520; Beaver v. Beaver, 23 Pa. St. 167. Thus, the principal defendant in a garnishee process, who, before service of the attachment, assigned the debt due from the garnishees, without retaining any liability to his assignee in

case of non-payment, was a competent witness for the garnishees. Byars v. Griffin, 31 Miss. 603.

<sup>5</sup> Cates v. Wacter, 2 Hill (S. C.) 442. See also Patton v. Allison, 7 Humph. (Tenn.) 320.

<sup>6</sup> Lindsley v. Malone, 23 Pa. St. 24.

<sup>7</sup> Phinney v. Tracey, 1 Pa. St. 173; Leiper v. Peirce, 6 Watts & S. (Pa.) 555; Cochran v. M'Teague, 8 Id. 272; Gates v. Johnston, 3 Pa. St. 52; Jarvis v. Barker, 3 Vt. 445. But compare to the contrary, Bank of Woodstock v. Clark, 25 Vt. 308.

<sup>8</sup> Dearborn v. Dearborn, 10 N. H. 473.

at law against himself and his surety, without the latter's joining him, he could render his surety a competent witness for him by paying all costs of the action at law, and depositing with the surety a sum sufficient to cover any liability in that action.<sup>1</sup> And even corporators could be rendered competent for each other or the corporation by actual payment of the costs; but, it seems, security or a deposit for their payment would not suffice.<sup>2</sup>

§ 91. — by **Disclaimer of Title.** — In New Hampshire, one of two defendants in a real action, who filed a disclaimer of title on which the plaintiffs failed to take issue, and who was not shown to be in privity with any other parties or otherwise interested, was held a competent witness for his co-defendant.<sup>3</sup> But the contrary was maintained in Pennsylvania, even where the costs were paid up to the time of the disclaimer,<sup>4</sup> and in Texas the same rule prevailed unless the previous costs were paid,<sup>5</sup> but a later decision in that State does not regard a person so disclaiming as thereafter a party, within statutory provisions defining the competency of parties to testify.<sup>6</sup> For the like reason a party defendant in a suit in equity who disclaimed all interest in the subject-matter of the suit, and in its result, was held competent to testify for his co-defendant.<sup>7</sup>

§ 92. — by **Judgment for or against the Witness.** — This means of restoring competency, or rather of rendering competent as a witness, a party to the suit, has already been treated with considerable fullness in a previous chapter.<sup>8</sup> In addition to the cases there cited a few others may be examined to advantage.<sup>9</sup>

<sup>1</sup> *Williams v. Mitchell*, 30 Ala. 299.

<sup>2</sup> *Mokelumne & Co. v. Woodbury*, 14 Cal. 265. In an early Alabama case it was held that a party could not divest the interest of a witness who would be liable over in the event of such party's failure to recover, by depositing a sum of money sufficient to cover such liability over with the clerk of the court; but the decision seems to have turned upon the clerk's lack of authority to receive money which might be recovered in a subsequent action. *Ball v. Bank of Alabama*, 8 Ala. 590.

<sup>3</sup> *Jenness v. Berry*, 17 N. H. 549.

<sup>4</sup> *Stule v. Leis*, 7 Watts (Pa.) 43.

But see *Kirk v. Ewing*, 2 Pa. St. 453.

<sup>5</sup> *Dikes v. Miller*, 24 Tex. 417.

<sup>6</sup> *Markham v. Carothers*, 47 Tex. 21.

<sup>7</sup> *Smith v. West*, 103 Ill. 332.

<sup>8</sup> *Supra*, §§ 38, 39, 42.

<sup>9</sup> *Wilmarth v. Mountford*, 4 Wash. (U. S.) 79; *Greenough v. Shelden*, 9 Iowa, 503; *Gates v. Gould*, Id. 599; *Arms v. Stockton*, 12 Id. 327; *Allen v. Shelby*, 14 B. Mon. (Ky.) 320; *State v. Atherton*, 40 Mo. 209; *Mann v. Cooper*, 1 Barb. (N. Y.) Ch. 185; *Marshall v. Franklin Bank*, 25 Pa. St. 384; *Delozier v. State*, 1 Head (Tenn.) 45.

§ 93. **Effect of indemnifying the Witness.**—The better opinion, at common law, seems to have been that where an interested witness was fully indemnified against liability, the objection of interest was obviated, and the witness was restored to competency. Thus, a sufficient sum of money having been placed in his hands to cover his liability for costs or otherwise, the indorser of the writ,<sup>1</sup> or the receptor of property involved in the suit,<sup>2</sup> or the surety on the bond of the plaintiff in replevin,<sup>3</sup> became a competent witness. So, also, a bond of indemnity was held to restore to competency a party liable for the costs of the defence in case the plaintiff should fail to recover;<sup>4</sup> and the same was held of a stake-holder who had transferred the subject-matter of the wager after notice from the loser not to do so.<sup>5</sup>

But the decisions upon this subject are not altogether harmonious. Thus, it has been held that a mere offer of indemnity from the consequences of the suit will not render a party to the record a competent witness;<sup>6</sup> and that a bond of indemnity from a third person will not have that effect with an interested witness.<sup>7</sup> So, also, it has been decided that a defendant who conveys the matter in dispute, *pendente lite*, and takes a bond of indemnity for costs from his grantee, does not thereby make himself a competent witness.<sup>8</sup> But the weight of authority was in favor of admitting a witness thus secured.<sup>9</sup>

§ 94. **Other Modes of restoring Competency.**—Where a witness was incompetent because of his being surety on a bond given in the action, he could be rendered a competent witness, either by substituting another surety or by a deposit in court, of a sufficient sum of money.<sup>10</sup> Thus, a surety on a

<sup>1</sup> *Beckley v. Freeman*, 15 Pick. (Mass.) 468; *Roberts v. Adams*, 9 Me. 9.

<sup>2</sup> *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Beckley v. Freeman*, 15 Id. 468; *Jordan v. Young*, 37 Me. 276.

<sup>3</sup> *Hall v. Baylies*, 15 Pick. (Mass.) 51.

<sup>4</sup> *Lake v. Auburn*, 17 Wend. (N. Y.) 18. See also *Brandigee v. Hale*, 13 Johns. (N. Y.) 125.

<sup>5</sup> *Leverett v. Stegall*, 23 Ga. 257.

<sup>6</sup> *Eaton v. White*, 2 Wis. 292.

<sup>7</sup> *Josey v. Wilmington &c. R. R. Co.*, 11 Rich. (S. C.) 399; even though it be conditioned to protect the witness from all liability of whatsoever kind. *Molyneaux v. Collier*, 30 Ga. 731; *Kennedy v. Evans*, 31 Ill. 258; *Paine v. Hussey*, 17 Me. 274.

<sup>8</sup> *Shelby v. Smith*, 2 A. K. Marsh. (Ky.) 504.

<sup>9</sup> See cases cited *supra*.

<sup>10</sup> *Klockenbaum v. Pierson*, 22 Cal. 160.



replevin bond was rendered competent by the substitution of another surety in his stead;<sup>1</sup> and one who had signed a prosecution bond was admitted to testify upon the substitution of a new bond.<sup>2</sup> But it would seem that one of two joint-executors, proponents of a will, could not render himself competent to sustain the will, by renouncing his trust.<sup>3</sup>

§ 95. **Necessity of Seal; Assent; Delivery.** — (1) *Seal*. Some of the common-law decisions hold that a technical release of interest must be under seal,<sup>4</sup> even though such release be in the shape of a receipt in full of all demands on the part of the party calling the witness.<sup>5</sup> The entry of the release upon the minutes of the court did not obviate the objection of want of a seal.<sup>6</sup> In other cases, however, full effect was given a release which had no seal affixed.<sup>7</sup>

(2) *Assent*. The witness must have knowledge of the fact that he has been released, before going upon the stand;<sup>8</sup> the mere fact that the release is properly executed will not rehabilitate him in the absence of such knowledge.<sup>9</sup> Knowledge being necessary, it would naturally follow that the proposed witness or the party to whom the release is given must give his assent to it in order to render it effective; but where the giving of the release is apparently for the advantage of the person to whom it purports to be given, his assent to it will be presumed.<sup>10</sup> Pursuant to this rule, an assignment of all his interest in the suit, by the plaintiff of record, who also paid into court all costs present and future, was accepted by the court in the absence of the assignee.<sup>11</sup> Indeed, it has been held that a party cannot defeat a release or surrender

<sup>1</sup> Charlesworth v. Williams, 16 Ill. 338; Gray v. Morey, 26 Ill. 409. But see Cummings v. Gann, 52 Pa. St. 484.

<sup>2</sup> Otey v. Hoyt, 3 Jones (N. C.) L. 407.

<sup>3</sup> Deslonde v. Darrington, 29 Ala. 92. See also *supra*, § 85.

<sup>4</sup> The Governor v. Daily, 14 Ala. 469; Smith v. Harris, 3 Sneed (Tenn.) 553.

<sup>5</sup> Dennett v. Lamson, 30 Me. 223.

<sup>6</sup> Kennon v. M'Rae, 2 Port. (Ala.) 389.

<sup>7</sup> Dunham v. Branch, 5 Cush. (Mass.) 558; Boland v. Greenville, &c. R. R. Co., 12 Rich. (S. C.) 368.

<sup>8</sup> Seymour v. Strong, 4 Hill (N. Y.) 255; Fitzpatrick v. Baker, 31 Ala. 563; Gray v. Brown, 22 Ala. 262.

<sup>9</sup> State v. Mosely, 7 Coldw. (Tenn.) 576. In Georgia, it is held that an interested witness cannot be rendered competent by a release unless it was expressly authorized by him. McCurdy v. Terry, 33 Ga. 49.

<sup>10</sup> Porter v. Munger, 22 Vt. 191.

<sup>11</sup> Smith v. Bell, 35 Ga. 238.

tendered by a witness on the other side, by refusing his assent thereto.<sup>1</sup>

(3) *Delivery*. Ordinarily, a personal delivery of the release to the releasee was not essential;<sup>2</sup> a delivery to his attorney,<sup>3</sup> or a deposit of it in court,<sup>4</sup> was sufficient; but the usual and proper course was to tender the release to the witness before he was sworn in the cause;<sup>5</sup> the mere filing of it, without any showing that the witness had any notice of it, was not enough.<sup>6</sup> But notice being shown, the fact that the release was found on file among the papers in the cause was considered *prima facie* evidence of its delivery.<sup>7</sup> It has been held that a sworn acknowledgment on the part of the witness, that a release had been delivered to him before he was sworn, did not remove a well-founded objection to his competency;<sup>8</sup> and that the testimony of an apparently interested witness, who had executed a release which was not properly delivered, to the effect that he never had any interest in the suit, could not be received to show his competency.<sup>9</sup>

§ 96. **Proof of Release; Objections, etc.**—It was the proper course to produce the release of an interested witness, and prove its execution, in order that the court might judge of its sufficiency.<sup>10</sup> If there was a subscribing witness, proof of its execution by him was essential.<sup>11</sup> But a new trial was refused in a case where the witness, being asked whether he was interested in the suit, declared that he had parted with his interest, and, without further question, was allowed to testify in chief, the deed of transfer or release not being exhibited.<sup>12</sup> In such a case, where the party calling the witness is unable to produce the release, parol evidence is admissible to prove it.<sup>13</sup> If the release recites that it was

<sup>1</sup> Mathews v. Marchant, 3 Dev. & B. (N. C.) L. 40.

<sup>2</sup> Brown v. Brown, 5 Ala. 508; Doe v. Cassidy, 9 Ind. 63.

<sup>3</sup> Stevenson v. Mudgett, 10 N. H. 338; Porter v. Munger, 22 Vt. 191.

<sup>4</sup> Brown v. Brown, *supra*; Doe v. Cassidy, *supra*.

<sup>5</sup> Delee v. Sandel, 12 La. Ann. 208.

<sup>6</sup> Evans v. Pigg, 28 Tex. 586; Gray v. Brown, 22 Ala. 262.

<sup>7</sup> Kyle v. Bostick, 10 Ala. 589. S. P. Cooper v. Granberry, 33 Miss. 117.

<sup>8</sup> Myre v. Ludwig, 1 Pa. St. 47.

<sup>9</sup> Stevenson v. Mudgett, 10 N. H. 338.

<sup>10</sup> Southard v. Wilson, 21 Me. 494; Hobart v. Bartlett, 17 Me. 429. See also Allen v. Lacy, Dud. (Ga.) 81.

<sup>11</sup> Reading v. Metcalf, Hard. (Ky.) 535.

<sup>12</sup> Baxter v. Rodman, 3 Pick. (Mass.) 435.

<sup>13</sup> Jewet v. Worthington, 1 Root (Conn.) 226; Goodrich v. Hanson, 33 Ill. 498.

given in consideration of a sum of money named therein, it is competent for the other party to ask the witness whether in fact there was any consideration.<sup>1</sup> When the release has to be ruled sufficient by the court, there is no error in a refusal to allow the adverse party to introduce other testimony, showing an interest in the witness existing prior to the release.<sup>2</sup>

Objections to the want of proof of the execution of the release must be taken at the time it is offered, or such objections will be waived.<sup>3</sup>

<sup>1</sup> *Johnson v. Murchison*, 1 Wins. (N. C.) 292.

<sup>2</sup> *White v. Tucker*, 9 Iowa, 100.

<sup>3</sup> *Downey v. Hicks*, 14 How. (U. S.) 240; *Doe v. Paine*, 4 Hawks (N. C.) 64; *Rhines v. Baird*, 41 Pa. St. 256. In an early New York case it is held that where an objection is made to the sufficiency of a release, the judge ought not to allow the witness to pro-

ceed, and direct that his testimony should be relied on, if the party should afterwards give a sufficient release. But that where an objection is made on account of some informality in the release, the judge may allow the examination to proceed, while a new release is preparing, no objection being made by the opposite party. *Doty v. Wilson*, 14 Johns. (N. Y.) 379.

## CHAPTER VIII.

### OPERATION OF ENABLING STATUTES IN CIVIL CASES.

§ 97. In General.	§ 121. Minnesota.
§ 98. United States Courts.	§ 122. Mississippi.
§ 99. District of Columbia.	§ 123. Missouri.
§ 100. Alabama.	§ 124. Montana.
§ 101. Arizona.	§ 125. Nebraska.
§ 102. Arkansas.	§ 126. Nevada.
§ 103. California.	§ 127. New Hampshire.
§ 104. Colorado.	§ 128. New Jersey.
§ 105. Connecticut.	§ 129. New Mexico.
§ 106. Dakota.	§ 130. New York.
§ 107. Delaware.	§ 131. North Carolina.
§ 108. Florida.	§ 132. Ohio.
§ 109. Georgia.	§ 133. Oregon.
§ 110. Idaho.	§ 134. Pennsylvania.
§ 111. Illinois.	§ 135. Rhode Island.
§ 112. Indiana.	§ 136. South Carolina.
§ 113. Iowa.	§ 137. Tennessee.
§ 114. Kansas.	§ 138. Texas.
§ 115. Kentucky.	§ 139. Utah.
§ 116. Louisiana.	§ 140. Vermont.
§ 117. Maine.	§ 141. Virginia.
§ 118. Maryland.	§ 142. Washington Territory.
§ 119. Massachusetts.	§ 143. West Virginia.
§ 120. Michigan.	§ 144. Wisconsin.
§ 145. Wyoming.	

§ 97. **In General.**—Both in England and America the stringent rules of the common law which we have just been examining have been for the most part reversed, the modern doctrine being that parties to the record are not incompetent witnesses for that reason, their being parties affecting their credibility only; and witnesses interested in the event of the suit are also made competent, the objection of interest also going only to the credibility. Indirect interest in the result ceased to disqualify upon the passage of the statute 3 & 4 Wm. IV. c. 42, §§ 26, 27, which enactment rendered competent witnesses who, not being parties nor directly interested, were yet incompetent at common law by reason of an indirect interest in the record with regard to some subsequent suit.<sup>1</sup> In such cases, the statute provided that a

<sup>1</sup> 1 Phil. Ev. 66.

verdict or judgment, for or against the party for whom the witness should be examined, should not be admissible in evidence, for or against the witness, or any person claiming under him. Next came Lord Denman's act,<sup>1</sup> which abolished generally, the disqualification of interest, but did not render competent (1) any party to any suit, action, or proceeding, individually named in the record, except (subject to all just exceptions) a defendant in equity; (2) any lessor of the plaintiff in ejectment; (3) any tenant of the premises sought to be recovered in ejectment; (4) the landlord or other person in whose right any defendant in replevin may make cognizance; (5) any person, in whose immediate and individual behalf any action may be brought or defended, either wholly or in part; and (6) the husband or wife of any such persons respectively. The first proviso above noted was repealed, subject to certain specified exceptions by 14 & 15 Vict. c. 99, §§ 1, 2, and by 16 and 17 Vict. c. 83, husbands and wives are rendered competent, except in cases involving adultery or the disclosure of confidential communications.<sup>2</sup> Let us now briefly examine the enabling statutes of the several American jurisdictions, and some of the decisions in which they have been construed and applied, confining our attention to the latest expression of legislative will, as exhibiting the present condition of the law on the subject.

§ 98. **United States Courts.**—Congress enacted in 1864 “that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried.”<sup>3</sup> A subsequent statute passed by the same congress added the following proviso, “that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.”<sup>4</sup>

<sup>1</sup> 6 & 7 Vict. c. 85.

<sup>2</sup> See *infra*, Chap. X.

<sup>3</sup> Appropriation act, approved July 2, 1864, § 3; 13 Stat. at L. 351.

<sup>4</sup> Act approved March 3, 1865.

Both of these provisions are now incorporated in the Revised Statutes (2d ed.) § 858.

These enactments have been held to apply to actions in which the United States is a party, as well as to those between private parties.<sup>1</sup> The phrase "civil actions" in these provisions is used in contradistinction to prosecutions for crime; and includes all judicial controversies in which rights of property are involved, whether at law, in chancery, or in admiralty, and whether between private parties or such parties and the government.<sup>2</sup> It extends to the trial of a seizure of property for a violation of the internal revenue laws, and of the controversy arising upon a claim interposed thereto by a third party. The claimant in such case is a competent witness in his own behalf.<sup>3</sup> So, also, it extends to suits in chancery.<sup>4</sup> It operates not merely to give a privilege to each party which may be availed of or not as a matter of choice, but places the parties to a suit (except those named in the proviso) on a footing of equality with other witnesses; it makes all admissible to testify for themselves, and all compellable to testify for others.<sup>5</sup> But these provisions have no application to the courts of a Territory, they not being "courts of the United States."<sup>6</sup>

As early as the passage of the judiciary act, a witness, competent under the State laws, was also competent in suits at law in the United States courts;<sup>7</sup> and such has been the rule ever since. But this rule has been held not to apply to criminal cases,<sup>8</sup> or to suits in equity,<sup>9</sup> though why the latter distinction is taken is not easily seen.

By special enactments parties claimant or defendant in the Court of Claims are incompetent to support their claims and defences;<sup>10</sup> but it has been held that the United States could use as a witness, to defeat the claim, one whose interest was adverse to the claimant, although judgment against the claimant might establish his own right to the same claim.<sup>11</sup>

Under the above act creditors of an estate for whose sole

<sup>1</sup> *Green v. United States*, 9 Wall. 655.

<sup>2</sup> *United States v. Cigars*, 1 Woolw. 123; *Rison v. Cribbs*, 1 Dill. 181.

<sup>3</sup> *United States v. Cigars*, *supra*.

<sup>4</sup> *Rison v. Cribbs*, *supra*. But see to the contrary, *Segee v. Thomas*, 3 Blatchf. 11.

<sup>5</sup> *Texas v. Chiles*, 21 Wall. 488.

<sup>6</sup> *Good v. Martin*, 95 U. S. 90.

<sup>7</sup> *Vance v. Campbell*, 1 Black, 427; *Haussknecht v. Claypool*, Id. 431.

<sup>8</sup> *Segee v. Thomas*, 3 Blatchf. 11; *United States v. Hawthorne*, 1 Dill. 422.

<sup>9</sup> *Segee v. Thomas*, *supra*.

<sup>10</sup> Act of June 25, 1868 (15 Stat. at L. ch. 71); Rev. Stat. § 1079; *Hubbell's Case*, 4 Ct. of Cl. 37.

<sup>11</sup> *Bradley v. United States*, 104 U. S. 442.

benefit a suit is prosecuted in that court by the administrator, cannot be witnesses for him.<sup>1</sup>

Where the suit is against the personal representatives of a deceased person, an *ex parte* order, obtained by complainant before process issued for his own examination as a witness, does not qualify him as such on the ground that he is required by the court to testify.<sup>2</sup> But where the evidence of the deceased is before the jury, the other party should be allowed to testify;<sup>3</sup> and so should he when the contract in suit was originally made with a person who is living at the time of the trial and competent to testify.<sup>4</sup> The prohibition extends to the testimony of *parties* only—persons interested in the issue, but not parties, may testify to statements made by the deceased touching the subject-matter of the controversy.<sup>5</sup>

§ 99. **District of Columbia.**—Parties to the suit or proceeding, the persons in whose behalf it is brought or defended, and any and all persons interested in the same, are competent and compellable to give evidence, either *viva voce* or by deposition, on behalf of any or either of the parties: except defendants in criminal cases, and husband and wife, where the issue is a criminal one, or involves the question of adultery, or the inquiry touches a confidential communication.<sup>6</sup>

The provision relating to testimony by parties in actions by and against executors, administrators, and guardians, applies to the courts of this District as fully as to the U. S. Circuit and District courts.<sup>7</sup>

§ 100. **Alabama.**—“In suits and proceedings before any court or officer, other than criminal cases, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction, acted in any rep-

<sup>1</sup> Henegan v. United States, 17 Ct. of Cl. 155.

<sup>2</sup> Eslava v. Mazange, 1 Woods, 623.

<sup>3</sup> Mumm v. Owens, 2 Dill. 475.

<sup>4</sup> Robinson v. Maudell, 3 Cliff. 169.

<sup>5</sup> Potter v. Chicago Bank, 102 U.S. 163.

<sup>6</sup> Act of July 2, 1864, ch. 222.

<sup>7</sup> Page v. Burnstine, 102 U. S. 604 (Bradley, J., dissenting). S. P. McGuire v. Corwine, 3 MacArth. 81.

representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced."<sup>1</sup>

Under this section a party may examine his adversary as a witness in open court, and is not compelled to file interrogatories to him, as under the former statute.<sup>2</sup> And the husband is competent for the wife's trustee, claiming a promissory note under a transfer by the husband, in a contest with his attaching creditor.<sup>3</sup> The former requirement of a written statement of what the party proposed to testify,<sup>4</sup> is repealed by this section so far as it affects the parties rendered competent thereby.<sup>5</sup>

Criminal cases are expressly excepted; therefore one of two jointly indicted is incompetent for or against the other, unless there be a severance, a *nol. pros.*, or an acquittal: a plea of guilty, without a judgment rendered, will not render him competent.<sup>6</sup>

The provision allowing parties and persons interested to testify is not an *ex post facto* law. It operates only as a removal of a present disability, and does not affect any

<sup>1</sup> Code, 1876, § 3058 (2704), p. 713.

<sup>2</sup> *Olive v. Adams*, 50 Ala. 373.

As to the former statutory practice of filing interrogatories, see *Jordan v. Jordan*, 17 Ala. 466; *Colgin v. Redman*, 20 Ala. 650; *Pritchett v. Munroe*, 22 Ala. 501; *McCargo v. Crutcher*, 27 Ala. 171; *Ex parte McLendon*, 33 Ala. 276; *Saltmarsh v. Bower*, 34 Ala. 613; *Crymes v. White*, 37 Ala. 549.

<sup>3</sup> *Rowland v. Plummer*, 50 Ala. 182.

<sup>4</sup> Rev. Code, § 3218.

<sup>5</sup> *Richardson v. Stovall*, 57 Ala. 422.

<sup>6</sup> *Henderson v. State*, 70 Ala. 23. But the prosecutor is competent, *Bohannon v. State*, 73 Ala. 47; while the defendant, in an action to recover fines and penalties for the violation of a city ordinance, is not. *Mobile v. Jones*, 42 Ala. 630.

As to the right of a borrower to establish the defence of usury by his own oath under a statute passed in 1819, see *Faris v. King*, 1 Stew. 255; *Watkins v. Watkins*, 2 Id. 485; *Wilson v. Walker*, 3 Id. 211; *Palmer v. Severance*, 9 Ala. 751; *Swinney v. Dorman*, 25 Ala. 433.

For matters of practice relative to testimony by a plaintiff as to the correctness of the account or demand sued on, under early statutes, and § 2313 of the Code, see *Young v. M'Lemore*, 3 Ala. 295; *Bennett v. Armstead*, Id. 507; *Cave v. Burns*, 6 Ala. 780; *Hayden v. Boyd*, 8 Ala. 323; *Grant v. Cole*, 9 Ala. 366; *Jones v. McLuskey*, 10 Ala. 27; *Yarborough v. Hood*, 13 Ala. 176; *Jordan v. Owen*, 27 Ala. 152; *Waring v. Henry*, 30 Ala. 721; *Yonge v. Mobile &c. R. R. Co.*, 31 Ala. 422; *West v. Brunn*, 35 Ala. 263; *Fitzpatrick v. Hays*, 36 Ala. 684.

For decisions under § 2302 of the Code, which removes all disability by reason of liability over for costs, etc., see *Rupert v. Elston*, 35 Ala. 79; *Cook v. Patterson*, Id. 102; *Hutton v. Williams*, Id. 503; *Coate v. Coate*, 37 Ala. 695; s. c., Ala. Sel. Cas. 627.

As to the examination of parties as witnesses in justice's courts, see *Hamblin v. McLendon*, 37 Ala. 711; *Alabama &c. R. R. Co. v. Oaks*, Id. 694; s. c., Ala. Sel. Cas. 625. The statute said to be repealed, *Lemay v. Walker*, 62 Ala. 39.



vested right or impair the obligation of any contract.<sup>1</sup> Thus, in an action against a railroad company, the plaintiff is competent as a witness for himself, although the action was commenced before the passage of the act.<sup>2</sup>

The effect of the exception that where an executor or administrator is a party, neither party shall testify against the other as to any transaction with or statement by the testator or intestate, etc., is not to render a witness incompetent generally, but incompetent only to testify upon the subjects specified.<sup>3</sup> But the exception applies to transactions with a deceased administrator or executor in suits by or against his successors in the administration, as well as to those with the decedent himself.<sup>4</sup> In such a case, however, if the successor in the trust (the defendant) testifies to admissions made by the plaintiff tending to show something done by the deceased, the plaintiff may show that the matters he spoke of did not have the effect claimed by the defendant.<sup>5</sup> The prohibition extends to beneficiaries in the suit though not parties to the record. Thus a person contracting with the decedent is not, by having transferred his claim to another, rendered competent to prove the contract, in his own behalf, in a suit against the personal representative.<sup>6</sup> So, also, a distributee of an estate is within the exception.<sup>7</sup> In such a suit, the plaintiff cannot prove a verbal gift by the testator to himself, of the subject-matter of the action.<sup>8</sup>

In suits involving partnership matters more latitude is allowed. Thus a party may testify as to transactions had with a partnership one of the members of which has since died, even though his personal representatives and heirs are parties, provided it does not appear that such transactions were with the deceased partner personally.<sup>9</sup> And in an action by or against a surviving partner, a party may testify to a transaction had with the deceased partner.<sup>10</sup>

<sup>1</sup> *Walthall v. Walthall*, 42 Ala. 450.

<sup>2</sup> *Montgomery &c. R. R. Co. v. Edmonds*, 41 Ala. 667.

<sup>3</sup> *O'Neal v. Reynolds*, 42 Ala. 197; *Ala. Gold Life Ins. Co. v. Sledge*, 62 Ala. 566. Compare *Thomas v. Thomas*, Id. 120.

<sup>4</sup> *Waldman v. Crommelin*, 46 Ala. 580.

<sup>5</sup> *Cousins v. Jackson*, 52 Ala. 262.

<sup>6</sup> *Drew v. Simmons*, 58 Ala. 463;

*Louis v. Easton*, 50 Ala. 470. Compare *Stallings v. Hinson*, 49 Ala. 92.

<sup>7</sup> *McCrary v. Rash*, 60 Ala. 374.

<sup>8</sup> *Stuckey v. Bellah*, 41 Ala. 700.

<sup>9</sup> *Ala. Gold Life Ins. Co. v. Sledge*, 62 Ala. 566.

<sup>10</sup> *Bradley v. Patton*, 51 Ala. 108; *Bragg v. Clark*, 50 Ala. 363. But compare *Causlee v. Wharton*, 62 Ala. 358.

For other instances of the applica-

§ 101. **Arizona.** — “All persons without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. No person offered as a witness shall be excluded by reason of his interest in the event of the action or proceeding; nor on account of opinions on matters of religious belief.”<sup>1</sup> The exceptions are (1) Persons of unsound mind at the time of trial; (2) Children under ten who appear incapable; (3) Indians, or half-breeds, where a white person is a party; (4) Negroes, or mulattos, under the same circumstances; (5) Husband or wife, for or against the other; or, without the consent of the other, to disclose “any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other.” (6) “An attorney or counselor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.” (7) “A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.” (8) “A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.” (9) “A public officer shall not be examined as a witness as to communications made to him in official confidence when the public interest would suffer by the disclosure.”<sup>2</sup>

“The judge himself, or any juror, may be called as a witness by either party; but in such case it shall be in the discretion of the court or judge to order the trial to be

tion of this exception in the statute, see *Weaver v. Morgan*, 49 Ala. 142; *Key v. Jones*, 52 Ala. 238; *Strange v. Graham*, 56 Ala. 614; *Hendricks v. Kelly*, 64 Ala. 388; *Davis v. Tarver*, 65 Ala. 98; *Boykin v. Smith*, Id. 294; *Killen v. Lide*, Id. 505; *Jackson v. Clopton*, 66 Ala. 29; *Beadle v. Gra-*

ham, Id. 99; *Dismukes v. Tolson*, 67 Ala. 386; *Fort v. Davis*, Id. 481; *Dudley v. Steele*, 71 Ala. 423; *Junkins v. Lovelace*, 72 Ala. 303.

<sup>1</sup> Comp. Laws, 1877, p. 469, §§ 393, 394.

<sup>2</sup> §§ 396-401.

postponed or suspended, and to take place before another judge or jury.”<sup>1</sup>

§ 102. *Arkansas*. — “In the courts of this State there shall be no exclusion of any witness, in civil actions, because he is a party to, or is interested in, the issue to be tried.”<sup>2</sup> “All persons, except those enumerated in the next section shall be competent to testify in a civil action.”<sup>3</sup> “The following persons shall be incompetent to testify: (1) Persons convicted of a capital offense, or of perjury, subornation of perjury, burglary, robbery, larceny, receiving stolen goods, forgery, counterfeiting or other infamous crime, except by the consent of both parties to the controversy, (2) Infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath, (3) Persons who are of unsound mind at the time of being produced as witnesses, (4) Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted, or afterward, (5) An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client’s consent. (6) In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with, or statements by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify by the court.”<sup>4</sup>

“All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered.”<sup>5</sup> “No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denominations.”<sup>6</sup> “No person authorized to practise physic or surgery shall be compelled to disclose any information which he may have acquired from his patient

<sup>1</sup> § 402. But an affidavit of a juror cannot be received to impeach his verdict. *Torque v. Carrillo*, 1 Ariz. 336.

<sup>2</sup> Dig. of Stat. 1874, § 2480; Const. Art. VII. § 22.

<sup>3</sup> § 2481; Civ. Code, § 662.

<sup>4</sup> § 2482; Civ. Code, § 663; Const. Art. VII. § 22.

<sup>5</sup> § 2483.

<sup>6</sup> § 2484.

while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon.”<sup>1</sup>

The constitutional provision above quoted, as to transactions with, or statements by, deceased persons, was not designed to exclude the testimony of such parties as to all matters in controversy in which the testator or ward had been interested, but only as to such matters as were strictly personal, and in which, from the nature of the case, the privilege of testifying could not be reciprocal and of mutual advantage.<sup>2</sup> Thus, it is held that a plaintiff cannot prove by his own testimony the correctness of his account founded on or embodying transactions between him and a deceased person;<sup>3</sup> or that the deceased maker of the note sued on (the latter’s administrator defending on the ground of a material alteration in the note) executed it just as it appears on the trial.<sup>4</sup> But where an administrator *de bonis non* is a party, the other party is not prohibited from testifying as to statements and conversations of the former administrator, who is dead.<sup>5</sup> And in suits by the widow and heirs of an intestate, for property descended from him, the defendant is not precluded from testifying to transactions with the intestate and statements made by him in regard to the matter in controversy.<sup>6</sup>

§ 103. **California.** — “All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section 1847.”<sup>7</sup>

“The following persons cannot be witnesses:—

<sup>1</sup> § 2485. For decisions under an early statute enabling either party to call the other as a witness, see *Drennen v. Lindsey*, 15 Ark. 359; *Adkins v. Hershy*, 17 Ark. 425.

<sup>2</sup> *Giles v. Wright*, 26 Ark. 476.

<sup>3</sup> *Miller v. Jones*, 32 Ark. 337.

<sup>4</sup> *Gist v. Gans*, 30 Ark. 285.

<sup>5</sup> *Wassell v. Armstrong*, 35 Ark. 247.

<sup>6</sup> *Bird v. Jones*, 37 Ark. 195. See also *Bozeman v. Browning*, 31 Ark. 364.

<sup>7</sup> *Hittel’s Code*, § 11,879.

1. Those who are of unsound mind at the time of their production for examination ;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly ;

3. Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of the deceased.”<sup>1</sup>

“ There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate ; therefore, a person cannot be examined as a witness in the following cases : (1) A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent ; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage ; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other ; (2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment ; (3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs ; (4) A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient ; (5) A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.”<sup>2</sup>

<sup>1</sup> § 11,880.

<sup>2</sup> § 11,881.

For decisions under earlier statutes in California, including the “ Practice Act ” so called, see *Dwinelle v. Henriquez*, 1 Cal. 387 ; *Johnson v. Carry*, 2 Cal. 33 ; *Sparks v. Kohler*, 3 Id. 299 ;

*Buckley v. Manife*, Id. 441 ; *Tomlinson v. Spencer*, 5 Id. 291 ; *Turner v. McIlhaney*, 8 Id. 575 ; *Columbus Co. v. Dayton Co.*, 18 Id. 615 ; *Bond v. Dorn*, 22 Id. 113 ; *Bradley v. Kent*, Id. 169 ; *Leet v. Wilson*, 24 Cal. 398 ; *Peterie v. Bugbey*, Id. 419 ; *Hall v. The Emily*

In the statute<sup>1</sup> prohibiting a party from being a witness where the opposite party is the representative of a deceased person, the word "representative" was held to apply to the executor or administrator of the deceased person, and also to the party who has succeeded to the right of the deceased, whether by purchase, or descent, or operation of law.<sup>2</sup> That statute covered all cases coming within its general terms, and made no distinction depending on privity or connection between the parties.<sup>3</sup> Even nominal parties, having no interest adverse to the estate, were excluded.<sup>4</sup>

But it has been held that this restrictive provision, as it exists in the present code, is not to be construed as prohibiting an executor or administrator from calling a party to the action to testify in *behalf* of the estate.<sup>5</sup> Nor does it prohibit one against whom an action is prosecuted by an executor on a claim in favor of an estate from being a witness in his own behalf.<sup>6</sup> And an application for a family allowance is held not to be within the provision, not being an "action or proceeding" on a "claim or demand" against the deceased.<sup>7</sup>

§ 104. **Colorado.**—The provisions sweeping away the incompetency of parties and persons interested in civil actions, where the estate of a deceased person is not concerned, are so similar to those we have already considered as not to warrant repetition here.<sup>8</sup> But where one of the parties "sues or defends as the trustee or conservator of an idiot, lunatic or distracted person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee," the other parties, and all persons directly interested in the event, are prohibited from testifying in the action or proceeding, "unless when called as a witness by such adverse party so suing or defending; and also, except in the following cases, namely: (1) In

Banning, 33 Id. 522; Jones v. Love, 9 Id. 68; Drake v. Eakin, 10 Id. 312; Tuolumne &c. Co. v. Columbia &c. Co., Id. 395.

As to the competency of Indians, negroes, and Chinamen, see *supra*, §§ 22-24; also People v. Hall, 4 Cal. 399; People v. Washington, 36 Id. 658.

<sup>1</sup> Which was repealed and replaced by § 11,880.

<sup>2</sup> Davis v. Davis, 26 Cal. 23.

<sup>3</sup> Satterlee v. Bliss, 36 Cal. 489.

<sup>4</sup> Blood v. Fairbanks, 50 Cal. 420.

<sup>5</sup> Chase v. Evoy, 51 Cal. 618.

<sup>6</sup> Sedgwick v. Sedgwick, 52 Cal. 336.

<sup>7</sup> Re McCausland's Estate, 52 Cal. 568. See also, generally, Laws of 1861, pp. 521, 522.

<sup>8</sup> See Gen. Stat. 1883, § 3640.

any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person; (2) When in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or parties in interest, such party or parties in interest may testify concerning the same conversation or transaction; (3) When in any such action, suit or proceeding, any such party suing or defending as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party in interest shall also be permitted to testify as to the same conversation or transaction; (4) When in any such action, suit or proceeding, any witness not a party to the record, or not a party in interest, or not an agent of such deceased person, shall in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or parties in interest, occurring before the death and in the absence of such deceased person, such adverse party or parties in interest may also testify to the same admission or conversation; (5) When in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or parties in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.”<sup>1</sup>

“When in a civil action, suit or proceeding, the claim or defence is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just, or that the same were made by a deceased person, or by a disinterested person, a non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the case.”<sup>2</sup>

<sup>1</sup> Gen. Stat. 1883, § 3641.

<sup>2</sup> § 3642.

"That in any action, suit or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof, shall by virtue of section one of this act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation."<sup>1</sup>

"That in any civil action, suit or proceeding, no person who would, if a party thereto, be incompetent to testify therein under the provisions of section two or section three, shall become competent by reason of any assignment or release of his claim made for the purpose of allowing such person to testify."<sup>2</sup>

"That nothing in this act contained shall in any manner affect the laws now existing relating to the settlement of estates of deceased persons, infants, idiots, lunatics, distracted persons, or to the acknowledgment or proof of deeds and other conveyances relating to real estate, in order to entitle the same to be recorded; or as to the attestation of the execution of the last wills and testaments, or of any other instrument required by law to be attested."<sup>3</sup>

"No person shall be deemed incompetent to testify as a witness on account of his or her opinion in relation to the Supreme Being or a future state of rewards and punishments; nor shall any witness be questioned in regard to his or her religious opinions."<sup>4</sup>

Under the provision first above quoted,<sup>5</sup> it is held that a widow suing her husband's administrator cannot testify that property sold by her husband in his lifetime, in fact belonged to her, and that her consent to the sale was on condition that the proceeds be invested in her name; there being nothing in the statutes relating to husband and wife bearing upon or modifying the rule in such cases.<sup>6</sup>

§ 105. **Connecticut.** — "No person who believes in the

<sup>1</sup> § 3643.

<sup>2</sup> § 3644.

<sup>3</sup> § 3645.

<sup>4</sup> § 3646. For the effect of a judgment by default to render the defaulted

defendant competent for his co-defendant, see *Good v. Martin*, 2 Col. T. 218.

<sup>5</sup> § 3641.

<sup>6</sup> *Palmer v. Hanna*, 6 Col. 55.



existence of a Supreme Being shall, on account of his religious opinions, be adjudged an incompetent witness.”<sup>1</sup>

“No person shall be disqualified as a witness in any action by reason of his interest in the event of the same, as a party or otherwise, or of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit.”<sup>2</sup>

“Any party to a civil action may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; but no party shall be allowed to compel an answer to a bill or motion for a discovery from an adverse party, and also to compel him to testify.”<sup>3</sup>

“Nothing in the two preceding sections contained shall in any manner affect the law relating to the attestation of any instrument required by law to be attested by subscribing witnesses.”<sup>4</sup>

“When the plaintiff in a bill in equity shall require of the defendant a discovery on oath, respecting the matters charged in the bill, the disclosure by the defendant shall not be deemed conclusive, but may be contradicted, like any other testimony, according to the practice in equity.”<sup>5</sup>

§ 106. **Dakota.** — “No person as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused, by reason of such person’s interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed or defended, except as herein-

<sup>1</sup> Gen. Stat. 1875, ch. 11, § 35, p. 440.

<sup>2</sup> *Ibid.* § 36. This is substantially the first portion of Rev. 1866, § 176, under which former provision it was held that a wife could be a witness for her husband. *Stanton v. Wilson*, 3 Day, 57; *Merriam v. H. & N. H. R. R. Co.*, 20 Conn. 354; and that parties

and persons interested are just as competent as disinterested persons; their interest affecting their credibility only. *Cowles v. Bacon*, 21 Conn. 451.

<sup>3</sup> *Ibid.* § 37, which replaces Rev. 1866, § 177, as to which see *Buckingham v. Barnum*, 30 Conn. 358.

<sup>4</sup> *Ibid.* § 38.

<sup>5</sup> *Ibid.* § 39.

after provided: (1) A husband cannot be examined for or against his wife, without her consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to, the other during the marriage; but this section does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other; (2) In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered, or order entered, for or against them, neither party shall be allowed to testify against the other, as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, then the other party shall be a competent witness, as to any and all matters to which the testimony so taken relates.”<sup>1</sup>

§ 107. **Delaware.** — “That a party to the record in any action or judicial proceeding, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled in the same manner, and subject to the same rules of examination, as any other witness to testify; but the party calling for such examination shall not be excluded thereby, but may rebut his testimony by other evidence.”<sup>2</sup>

“That a party proposing to examine a party adverse in interest may have the same process and means of compelling attendance and response as the law provides in the case of ordinary witnesses.”<sup>3</sup>

“That no person shall be excluded from testifying as a witness by reason of his having been convicted of a felony, but evidence of the fact may be given to affect his credibility.”<sup>4</sup>

§ 108. **Florida.** — “No person offered as a witness in any court, or before any officer acting judicially, shall be excluded

<sup>1</sup> Rev. Code, 1877, p. 590, § 446.

<sup>3</sup> *Ibid.* § 2.

<sup>2</sup> Rev. Code, 1874, p. 652, § 1.

<sup>4</sup> *Ibid.* § 3.

by reason of his interest in the event of the action or proceeding, or because he is a party thereto: *Provided, however,* That no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and the person at the time of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.”<sup>1</sup>

“No person shall be excluded from being a witness or from giving evidence either in person or by deposition in any suit or proceeding, civil or criminal, in any court or before any jury by reason of having been convicted of any criminal offence, except the crimes of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy or buggery; but every such person shall be admitted to be sworn as a witness, and testimony of his or her general character and the record of such conviction may be given in evidence to effect his or her credibility with the jury, who shall judge thereof.”<sup>2</sup>

§ 109. *Georgia.* — “No person offered as a witness shall be excluded by reason of incapacity for crime or interest or from being a party, from giving evidence either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or party having by law or consent of parties, authority to hear, receive, and examine evidence;

<sup>1</sup> Dig. Laws (McClellan's Ed. 1881), p. 518, § 24.

<sup>2</sup> § 7, ch. 202, p. 991.

For decisions under these enact-

ments, see *Tunno v. Robert*, 16 Fla. 738; *Robinson v. Dibble*, 17 Fla. 457; *Raulerson v. Rocker*, Id. 809; *Sanderson v. Sanderson*, Id. 820.

but every person so offered shall be *competent*, and compellable to give evidence on behalf of either or any of the parties to the said suit, action, or other proceeding, except as follows: (1) Where one of the original parties to the contract or cause of action in issue or on trial, is dead, or is shown to the court to be insane, or where an executor or administrator is a party in any suit on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor; (2) No person, who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, is competent or compellable to give evidence for or against himself or herself; (3) No person shall be compellable to answer any question tending to criminate himself or herself; (4) No husband shall be competent or compellable to give evidence for or against his wife in any criminal proceeding; nor shall any wife, in any criminal proceeding, be competent or compellable to give evidence for or against her husband. But the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offense committed, or attempted to have been committed, upon the person of the wife; (5) No attorney shall be compellable to give evidence for or against his client.”<sup>1</sup>

“Nothing contained in the preceding section shall apply to any action, suit, or proceeding, or bill, in any court of law or equity, instituted in consequence of adultery, or to any action for breach of promise of marriage.”<sup>2</sup>

“Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses.”<sup>3</sup>

“Drunkenness, which dethrones reason and memory, incapacitates during its continuance.”<sup>4</sup>

“No physical defects in any of the senses incapacitates a witness. An interpreter may explain his evidence.”<sup>5</sup>

“The court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy or insanity, or drunkenness, or childhood.”<sup>6</sup>

“The objection to competency, if known, must be taken

<sup>1</sup> Code, 1882, p. 1002, § 3854.

<sup>2</sup> § 3855.

<sup>2</sup> § 3856.

<sup>4</sup> § 3857.

<sup>5</sup> § 3858.

<sup>6</sup> § 3859.

before the witness is examined at all. It may be proved by the witness himself, or by other testimony; if proved by other testimony, the witness is incompetent to explain it away."<sup>1</sup>

"Any act which, in the judgment of the court, removes the ground of incompetency, will restore the competency of the witness."<sup>2</sup>

Under section 3855 above quoted, a woman cannot be received as a witness, in her own behalf, to prove a contract by a married man, that, in consideration of her consent to sexual intercourse, he will make a certain provision for her, in the event of pregnancy. This is a suit instituted in consequence of adultery, within the section.<sup>3</sup>

The proper construction of the first exception in section 3854 has been held to be that the parties must have been on different sides of the contract, or cause of action, or must be parties with conflicting interests in the issue on trial, to exclude the survivor as a witness on the death of one of the parties.<sup>4</sup> Where the suit is against administrators, the plaintiff is incompetent, even though he negotiated and contracted with one of the administrators who was acting as the agent of the intestate, then living.<sup>5</sup> In such a case the plaintiff cannot testify as to whether or not the deceased fulfilled his contract.<sup>6</sup> Thus, a devisee cannot testify that the testator made her a parol gift of the land devised.<sup>7</sup> Nor can a plaintiff deny the genuineness of letters addressed to the defendant's intestate, which purport to be in the plaintiff's handwriting.<sup>8</sup>

On the other hand, there are many cases in which a party may testify even though the opposite party is dead: such is the case in controversies arising under the ordinances of 1865, for the adjustment of Confederate contracts;<sup>9</sup> in cases where a third party interposes a claim to property

<sup>1</sup> § 3860.

<sup>2</sup> § 3861.

<sup>3</sup> *Sloan v. Briant*, 56 Ga. 59.

<sup>4</sup> *Perry v. Hodnett*, 38 Ga. 103.

<sup>5</sup> *Whitaker v. Groover*, 54 Ga. 174.  
*S. P. Freeman v. Bigham*, 65 Ga. 580.

<sup>6</sup> *Hays v. Callaway*, 58 Ga. 288.

<sup>7</sup> *Bothwell v. Dobbs*, 59 Ga. 789.  
*S. P. Gabbett v. Sparks*, 60 Ga. 582.

<sup>8</sup> *Ford v. Holmes*, 61 Ga. 419. See also, for further applications of the rule of exclusion, *Gray v. Obear*, 54 Ga. 231; *Virgin v. Wingfield*, 56 Ga. 474; *Central R. R. & Co. v. Papot*, 59 Ga. 342; *Oatis v. Harrison*, 60 Ga. 535; *Muller v. Rhuman*, 62 Ga. 332.

<sup>9</sup> *Horne v. Goung*, 40 Ga. 193.

levied on by execution;<sup>1</sup> in an action to reform a deed on the ground of mistake;<sup>2</sup> or where the party merely seeks to indentify a book of accounts, sought to be introduced by him, as his book of original entries.<sup>3</sup> Again, an agent, not a party to the suit, is competent to show the agency, not disclosed at the time of the transaction in controversy, although his principal is dead, and although the effect of establishing the agency may be to make the estate of the principal liable instead of the agent individually.<sup>4</sup> And where an executor is plaintiff, the defendant may testify as to all relevant conversations between himself and the living parties with whom it was had, though one of the parties, executor's testator, is dead.<sup>5</sup> So, also, where the heirs at law of the deceased party, they being the real defendants in interest, have testified as to interviews between the intestate and the plaintiff, the plaintiff may testify in rebuttal of their testimony.<sup>6</sup> And where the testimony of the deceased on a former trial, or his deposition, is introduced, this renders the opposite party competent as a witness;<sup>7</sup> and the same is true where the deposition is in court and can be used.<sup>8</sup>

Below will be found cases illustrating the above principles where the cause of action was founded upon a bill of exchange or promissory note;<sup>9</sup> where the suit was by or against a surviving partner;<sup>10</sup> and where the proposed witness was

<sup>1</sup> *Anderson v. Wilson*, 45 Ga. 25; *Sterling v. Arnold*, 54 Ga. 690.

<sup>2</sup> *Payne v. Elyea*, 50 Ga. 395.

<sup>3</sup> *Strickland v. Wynn*, 51 Ga. 600.

<sup>4</sup> *Lowrys v. Candler*, 64 Ga. 236.

<sup>5</sup> *Clark v. Bell*, 61 Ga. 147.

<sup>6</sup> *Parkerson v. Burke*, 59 Ga. 100.

<sup>7</sup> If one of the parties be offered as a witness by the other side, and be examined only in respect to matters which did not transpire between the witness and the deceased, while the cross-examination should be full in respect to the matters so inquired about on the direct examination, it should not operate as a license to the party examined to testify to transactions which took place between him and deceased, such as delivery of property, and payment of money, to deceased in compliance with an award, the delivery and payment being vital

issues in the case. *Perry v. Mulligan*, 58 Ga. 479.

<sup>8</sup> *Monroe v. Napier*, 52 Ga. 385.

<sup>9</sup> *Allen v. Morgan*, 61 Ga. 107. But see to the contrary, *Hollis v. Calhoun*, 54 Ga. 115. See also *Outz v. Seabrook*, 47 Ga. 359; *North Ga. Mining Co. v. Latimer*, 51 Ga. 47; *Sheibley v. Hill*, 57 Ga. 232; *Davis v. McLester*, 65 Ga. 132; *Allen v. Davis*, 65 Ga. 179; *Kilpatrick v. Strozier*, 67 Ga. 247; *Turner v. Jordan*, Id. 604.

<sup>10</sup> *Archer v. Greer*, 36 Ga. 107; *Rawson v. Poindexter*, 44 Ga. 73; *Dixon v. Edwards*, 48 Ga. 142; *Wright v. Bessman*, 55 Ga. 187; *Dobson v. Dickson*, 62 Ga. 639; *Lemon v. Hornsby*, 63 Ga. 271; *Rush v. Ross*, 65 Ga. 144.

<sup>11</sup> *Leaptrot v. Robertson*, 37 Ga. 586; *Moore v. Harlan*, Id. 623; *Long v. McDonald*, 39 Ga. 186; *Graham v.*

the personal representative of the deceased,<sup>1</sup> or his widow.<sup>2</sup>

§ 110. **Idaho.** — In this territory all persons capable of perception and communication of ideas are competent witnesses, whether parties or interested in the event or not. But persons insane “at the time of their production for examination,” children under ten who appear incapable, parties in actions against personal representatives, husband and wife, attorneys, clergymen, physicians, and public officers, are excluded in certain cases; and judges and jurors are competent on being superseded in their offices for the time being.<sup>3</sup>

§ 111. **Illinois.** — “That no person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence.”<sup>4</sup>

“No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues

Howell, 50 Ga. 203; *Bryan v. Tooke*, 60 Ga. 437; *Hammond v. Drew*, 61 Ga. 189; *Ford v. Kennedy*, 64 Ga. 537; *Southwestern R. R. Co. v. Papot*, 67 Ga. 675.

<sup>1</sup> *Crenshaw v. Robinson*, 37 Ga. 118; *McIntyre v. Meldrim*, 40 Ga. 490; *McGehee v. Jones*, 41 Ga. 123; *Harris v. Harris*, 53 Ga. 678; *Williams v. McDowell*, 54 Ga. 222; *Stanford v. Murphy*, 63 Ga. 410.

<sup>2</sup> *Adams v. Jones*, 39 Ga. 479; *Jackson v. Jackson*, 40 Ga. 150; *Willingham v. Smith*, 48 Ga. 580; *Wagner v. Robinson*, 56 Ga. 47.

For decisions under earlier statutes authorizing a party to testify on the question of usury, see *Persons v. Hight*, 4 Ga. 474; *Wright v. Lawson*, 13 Ga. 459.

As to the practice of submitting interrogatories to an adverse party, under the acts of 1847 and 1850, to compel discoveries at law, see *Zeigler v. Scott*, 10 Ga. 389; *Tillinghast v. Nourse*, 14 Ga. 641; *Thornton v. Adkins*, 19 Ga. 464; *Bridges v. Nicholson*, 20 Ga. 90; *Roberts v. Keaton*, 21 Ga. 180; *Wood v. McGuire*, Id. 576; *Stevens v. Zachary*, 27 Ga. 427; *Dyson v. Beckam*, 35 Ga. 132.

As to the right, under the common-law practice, of a party to prove his account or set-off by his own oath, see *Blake v. Freeman*, 13 Ga. 215; *Nichols v. McAbee*, 30 Ga. 8.

<sup>3</sup> Code, Civ. Pro. 1881, §§ 897-900.

<sup>4</sup> Rev. Stat. 1880, p. 505, § 1.

or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: (1) In any such action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority; (2) When, in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction; (3) Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction; (4) Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation; (5) When in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.”<sup>1</sup>

“Where in any civil action, suit or proceeding, the claim or defence is founded on a book account, any party or inter-

<sup>1</sup> *Ibid.* § 2.



ested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause.”<sup>1</sup>

“In any action, suit or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party, or person adversely interested in the event thereof, shall, by virtue of section one of this act, be rendered a competent witness, to testify to any admission or conversation, by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness as to any conversation or transaction between himself and such agent, except where the conditions are such, that under the provisions of sections two and three of this act, he would have been a principal and not an agent.”<sup>2</sup>

“No husband or wife shall, by virtue of section one of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in

<sup>1</sup> *Ibid.* § 3.

<sup>2</sup> *Ibid.* § 4.

actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act: *Provided*, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife.”<sup>1</sup>

“Any party to any civil action, suit or proceeding, may compel any adverse party or person for whose benefit such action, suit or proceeding is brought, instituted, prosecuted or defended, to testify as a witness at the trial, or by deposition, taken as other depositions are by law required, in the same manner, and subject to the same rules, as other witnesses.”<sup>2</sup>

“In any civil action, suit or proceeding, no person who would, if a party thereto, be incompetent to testify therein under the provisions of section two or section three, shall become competent by reason of any assignment or release of his claim, made for the purpose of allowing such person to testify.”<sup>3</sup>

“Nothing in this act contained shall in any manner affect the laws now existing relating to the settlement of the estates of deceased persons, infants, idiots, lunatics, distracted persons, or habitual drunkards having conservators, or to the acknowledgment or proof of deeds and other conveyances relating to real estate, in order to entitle the same to be recorded, or to the attestation of the execution of last wills and testaments, or of any other instrument required by law to be attested.”<sup>4</sup>

<sup>1</sup> *Ibid.* § 5.

<sup>2</sup> *Ibid.* § 6.

<sup>3</sup> *Ibid.* § 7.

<sup>4</sup> *Ibid.* § 8.

For decisions as to the competency of parties and persons interested under previous statutes, now obsolete, see *Pickering v. Misner*, 11 Ill. 507; *Pitts-*

*field &c. Plank-road Co. v. Harrison*, 16 Ill. 81; *Lee v. Quick*, 20 Ill. 392; *Brown v. Hurd*, 41 Ill. 121; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Illinois &c. R. R. Co. v. Weldon*, 52 Ill. 290; *Reget v. Bell*, 77 Ill. 593; *Bradshaw v. Combs*, 102 Ill. 428.

The intention of the statute is that no person directly interested, etc., shall be allowed to testify, where the adverse party sues or defends as the executor, administrator, heir, legatee, or devisee of any deceased person, except as to facts occurring subsequent to the death of the deceased, — to those he may testify; but if the adverse party sues or defends as guardian or trustee for such heir, legatee, or devisee, then the additional restriction is imposed, that such facts shall have occurred not only subsequent to the death of the deceased, but also after such heir, legatee, or devisee shall have attained his or her majority.<sup>1</sup> The provision applies as well in favor of a remote, as in that of an immediate heir. The word “heirs” comprehends the heirs of heirs, *ad infinitum*. The intent of the statute is to make the right of a party to testify a mutual right, and to withhold it where the adverse party claims in a representative capacity under a deceased person.<sup>2</sup> Facts which happened after the death of the deceased person may in all cases be testified to.<sup>3</sup> Where a witness has testified on behalf of the estate, the other side may produce witnesses to testify upon the same subject-matter, even though it may involve transactions with or statements by the deceased.<sup>4</sup> A necessary, though not actual, party will be deemed incompetent, the same as if he were an actual party to the record.<sup>5</sup>

§ 112. *Indiana*. — “All persons, whether parties to or

<sup>1</sup> *Stone v. Cook*, 79 Ill. 424. See also *Langley v. Dodsworth*, 81 Ill. 86.

<sup>2</sup> *Merrill v. Atkin*, 59 Ill. 19.

<sup>3</sup> *Funk v. Eggleston*, 92 Ill. 515.

<sup>4</sup> *Straubher v. Mohler*, 80 Ill. 21; *Penn v. Oglesby*, 89 Ill. 110; *Jacquin v. Davidson*, 49 Id. 82; *Stewart v. Kirk*, 69 Ill. 509.

<sup>5</sup> *Alexander v. Hoffman*, 70 Ill. 114.

For decisions applying the above statutory provisions in actions upon *bills and notes*, see *Whitmer v. Rucker*, 71 Ill. 410; *Sconce v. Henderson*, 102 Ill. 376; *Hurlburt v. Meeker*, 104 Ill. 541; *Redden v. Inman*, 6 Ill. App. 55; *Combs v. Bradshaw*, 6 Id. 115; in suits respecting *real property*, see *Stonecipher v. Hall*, 64 Ill. 121; *Alexander v. Hoffman*, 70 Ill. 114; *King v. Worthington*, 73 Ill. 161; *Byle v. Oustatt*, 92 Ill. 209; *McCann v. Ath-*

*erton*, 106 Ill. 31; in suits to *foreclose mortgages*, see *Boester v. Byrne*, 72 Ill. 466; *Remann v. Buckmaster*, 85 Ill. 403; *Richardson v. Hadsal*, 106 Ill. 476; to *redeem from foreclosure*, see *Donlery v. Montgomery*, 66 Ill. 227; *Ruckman v. Atwood*, 71 Ill. 155. As to the competency of the *widow of the deceased person*, see *Reeves v. Herr*, 59 Ill. 81; *Stewart v. Kirk*, 69 Ill. 509; *Connelly v. Dunn*, 73 Ill. 218; *Primmer v. Clabaugh*, 78 Ill. 94. See also, as to the application of the *restrictive provision, generally*, *Buck v. Beekly*, 45 Ill. 100; *Kent v. Mason*, 79 Ill. 540; *Forbes v. Snyder*, 94 Ill. 374; *Walsh v. Wright*, 101 Ill. 178; *Apperson v. Goggin*, 3 Ill. App. 48; *Henry v. Tiffany*, 5 Id. 548; *Douglas v. Fullerton*, 7 Id. 102; *Stevens v. Brown*, 12 Id. 619.

interested in the suit, shall be competent witnesses in a civil action or proceeding, except as herein otherwise provided.”<sup>1</sup>

“The following persons shall not be competent witnesses:

(1) Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not; (2) Children under ten years of age, unless it appears that they understand the nature and obligation of an oath; (3) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases; (4) Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases; (5) Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches; (6) A husband and wife, as to communications made to each other.”<sup>2</sup>

“In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the life-time of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate: *Provided, however,* That in cases where a deposition of such decedent has been taken, or he has previously testified as to the matter, and his testimony or deposition can be used as evidence for such executor or administrator, such adverse party shall be a competent witness for himself, but only as to any matters embraced in such deposition or testimony.”<sup>3</sup>

“In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor.”<sup>4</sup>

“When in any case an agent of a decedent shall testify on behalf of an executor, administrator, or heirs, concerning any transaction, as having been had by him, as such agent, with

<sup>1</sup> Rev. Stat. 1881, p. 93, § 496.

<sup>2</sup> *Ibid.* § 497.

<sup>3</sup> *Ibid.* § 498.

<sup>4</sup> *Ibid.* § 499.

a party to the suit, his assignor or grantor, and in the absence of the decedent, or if any witness shall, on behalf of the executor, administrator, or heirs, testify to any conversation or admission of a party to the suit, his assignor or grantor, as having been had or made in the absence of the deceased; then the party against whom such evidence is adduced, his assignor or grantor, shall be competent to testify concerning the same matter. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness, in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent, unless he shall be called by such heirs or legal representatives. And in such case he shall be a competent witness only as to matters concerning which he is interrogated by such heirs or representatives. When, in any case, a person shall be charged with unlawfully taking or detaining personal property, or having done damage thereto, and such person by his pleading shall defend on the ground that he is executor, administrator, guardian, or heir, and as such has taken or detains the property, or has done the acts charged, then no person shall be competent to testify who would not be competent if the person so defending were the complainant; but when the person complaining cannot testify, then the party so defending shall also be excluded.”<sup>1</sup>

“When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded; except that the husband shall be a competent witness in a suit for the seduction of the wife, but she shall not be competent.”<sup>2</sup>

“In all cases in which executors, administrators, heirs, or devisees are parties, and one of the parties to the suit shall be incompetent, as hereinbefore provided, to testify against them, then the assignor or grantor of a party making such assignment or grant voluntarily, shall be deemed a party adverse to the executor or administrator, heir or devisee, as the case may be: *Provided, however,* That in all cases referred to in the preceding sections, the objection to the competency of such witnesses may be waived. Or the Court may, in its

<sup>1</sup> *Ibid.* § 500.

<sup>2</sup> *Ibid.* § 501.

discretion, require any party to a suit, or other person, to testify; and any abuse of such discretion shall be reviewable upon appeal."<sup>1</sup>

"In all actions by an executor or administrator on contracts assigned to the decedent, when the assignor is alive and a competent witness in the cause, the executor or administrator and the defendant or defendants shall be competent witnesses as to all matters which occurred between the assignor and the defendant or defendants, prior to notice of such assignment."<sup>2</sup>

"No want of belief in a Supreme Being or in the Christian religion shall render a witness incompetent; but the want of such religious belief may be shown upon the trial. In all questions affecting the credibility of a witness, his general moral character may be given in evidence."<sup>3</sup>

"Any fact which might, heretofore, be shown to render a witness incompetent, may be hereafter shown to affect his credibility."<sup>4</sup>

As early as 1852 all objections to the competency of a witness by reason of crime or interest, were removed by statute;<sup>5</sup> and where one party called the other as a witness (which he could do), who testified to new matter, pertinent to the issue, but not responsive to the questions put to him, the party calling him could testify in respect to such new matter.<sup>6</sup>

In every case it must be made to appear in some legal way, that the alleged decedent is dead, before an objection can be sustained to the competency of a party to testify as to a matter which occurred prior to his assumed death.<sup>7</sup> And where the deposition of the deceased person is admitted in evidence, the other party may testify on all points contained

<sup>1</sup> *Ibid.* § 502.

<sup>2</sup> *Ibid.* § 503.

<sup>3</sup> *Ibid.* § 505. Section 504 relates to expert testimony only.

<sup>4</sup> *Ibid.* § 506.

<sup>5</sup> *Muir v. Gibson*, 8 Ind. 187.

<sup>6</sup> *Thompson v. Shæffer*, 9 Ind. 500; *Draggou v. Draggou*, 10 Ind. 95. For matters of practice as to examining an adverse party on interrogatories, see *McPheeters v. McPheeters*, 6

*Blackf.* 221; *Barnard v. Flinn*, 8 Ind. 204; *Hubler v. Pullen*, 9 Ind. 273; *Swift v. Ellsworth*, 10 Ind. 205; *Derning v. Patterson*, Id. 251; *Johnson v. Cox*, 12 Ind. 362; *Cleveland v. Hughes*, 12 Ind. 512; *French v. Veneman*, 14 Ind. 282; *Lung v. Sims*, 14 Ind. 467; *Railsback v. Koons*, 18 Ind. 274; *Smith v. Rosenham*, 19 Ind. 256.

<sup>7</sup> *Hodgson v. Jeffreys*, 52 Ind. 334.

in such deposition.<sup>1</sup> Declarations of the deceased, in his own favor, are inadmissible.<sup>2</sup>

Where the claim sued on is based on a contract made with the administrator, the party holding the claim is a competent witness in his own behalf.<sup>3</sup> In examining witnesses in these cases, an attempt, indirectly, to draw from the witness that which he is prohibited from directly stating, is not allowable.<sup>4</sup>

§ 113. **Iowa.** — "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. . . ." <sup>5</sup>

"Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." <sup>6</sup>

"No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter." <sup>7</sup>

"No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through,

<sup>1</sup> *Hatton v. Jones*, 78 Ind. 466.

<sup>2</sup> *Bristol v. Bristol*, 82 Ind. 276.

<sup>3</sup> *Voiles v. Voiles*, 51 Ind. 385.

<sup>4</sup> *Cottrell v. Cottrell*, 81 Ind. 87.

As to the competency of the *personal representative or guardian* to testify, see *Little v. Smiley*, 9 Ind. 116; *Markel v. Spitter*, 28 Ind. 488; *Goodwin v. Goodwin*, 48 Ind. 584; *Dembo v. Wright*, 53 Ind. 226. When the *widow* is competent, see *Pea v. Pea*, 35 Ind. 387; *Noble v. Withers*, 36 Ind. 193; *Tracy v. Kelley*, 52 Ind. 535; *Dembo v. Wright*, 53 Ind. 226. Applications of the statute in actions on *bills and notes*. *Walker v. Clifford*, 21 Ind. 123; *Skillen v. Skillern*, 41 Ind. 260; *Jenks v. Opp*, 43 Ind. 108; *Milam v. Milam*, 60 Ind. 58. Actions relative to *real property*, generally. *Gavin v. Buckles*, 41 Ind. 528; *Hodgson v. Jeffreys*, 52 Ind. 334; *Howard v. Howard*, 69 Ind. 592; *Harding v. Elzey*, 88 Ind. 321. *Foreclosure suits*. *Hoadley v. Hadley*, 48 Ind. 452; *Abshire v. Williams*, 76 Ind. 97. *Partition*

*suits*. *Dille v. Webb*, 61 Ind. 85; *Baker v. Baker*, 69 Ind. 399. Actions against *surviving partner*. *Dodd v. Rogers*, 68 Ind. 110; *Wrape v. Hampson*, 78 Ind. 499; *Meyer v. Morris*, Id. 558. Various applications of the statutory provision. *McDonald v. McDonald*, 24 Ind. 68; *Martin v. Asher*, 25 Ind. 237; *Kirchner v. Lewis*, 28 Ind. 499; *Reed v. Reed*, 30 Ind. 313; *Bishop v. Welch*, 35 Ind. 521; *Hall v. State*, 39 Ind. 301; *Sherlock v. Alling*, 44 Ind. 184; *Applegate v. Moffit*, 60 Ind. 104; *Coryell v. Stone*, 62 Ind. 307; *Charles v. Malott*, 65 Ind. 184; *Clift v. Shockley*, 77 Ind. 297; *Froman v. Rous*, 83 Ind. 94; *Pavey v. Wintrode*, 87 Ind. 379; *Terrell v. Butterfield*, 92 Ind. 1; *Cupp v. Ayers*, 89 Ind. 60; *Creamer v. Sirp*, 91 Ind. 366.

<sup>5</sup> Rev. Code 1880, p. 857, § 3636. As to criminal cases, see *Infra*, Chap. IX.

<sup>6</sup> *Ibid.* § 3637.

<sup>7</sup> *Ibid.* § 3638.

or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or persons shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or guardian, shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence.”<sup>1</sup>

“Any person may have his own deposition, or that of any other person, read and used as evidence in all cases where his evidence would be incompetent by the provisions of the preceding section, by causing such deposition to be taken, either before or after suit brought, during the lifetime or sanity of the person against whom, his executor, heir, or other representative, the same is to be used: *Provided*, such deposition shall have been taken and filed ten days prior to the death or insanity of such person. If after suit brought, such deposition may be taken in the usual manner; if before, then the same may taken *de bene esse*, as provided by law.”<sup>2</sup>

“Neither the husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed, one against the other, or in a civil action or proceeding, one against the other; but they may in all civil and criminal cases be witnesses for each other.”<sup>3</sup>

“Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.”<sup>4</sup>

“No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential

<sup>1</sup> *Ibid.* § 3639.

<sup>2</sup> *Ibid.* § 3640.

<sup>3</sup> *Ibid.* § 3641.

<sup>4</sup> *Ibid.* § 3642.



communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waives the rights conferred.”<sup>1</sup>

“A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.”<sup>2</sup>

“The judge of the court is a competent witness for either party, and may be sworn upon the trial. But in such case it is in his discretion to order the trial to be postponed or suspended and to take place before another judge.”<sup>3</sup>

In construing prior statutory provisions similar in character to § 3639, the courts have held that the interest which will disqualify a witness in an action in which an executor or administrator is a party, must be present, certain, and vested. If the interest is of a doubtful character, it goes to his credibility only.<sup>4</sup> Thus the restrictive provision does not apply to nor exclude the testimony of a witness who may have been, at some past time, the holder of a mere equitable interest in the property in controversy;<sup>5</sup> or that of a son who had been repaid a loan made to his father (the deceased), in an action by the father’s executors against one for whose benefit the money borrowed from the son had been expended.<sup>6</sup> So also in an action to enforce a judgment on a promissory note in favor of an estate against the indorser, the principal debtor was held competent to testify as to transactions between the indorser and the deceased, as he had nothing to gain or lose, whatever the result might be.<sup>7</sup> And the plaintiff’s attorney, in an action against an administrator, was held competent, there being no agreement for a contingent fee, although the attorney did not know that he would be paid anything if the action failed.<sup>8</sup> Again, the provision does not apply when the deceased was only a trustee in regard to the matter in controversy, and the *cestui que*

<sup>1</sup> *Ibid.* § 3643.

<sup>2</sup> *Ibid.* § 3644.

<sup>3</sup> *Ibid.* § 3645.

<sup>4</sup> *Wormley v. Hamburg*, 40 Iowa, 229.  
<sup>5</sup> *S. P. Goddard v. Leffinwell*, Id. 249.

<sup>6</sup> *Zerbe v. Reigart*, 42 Iowa, 229.

<sup>7</sup> *Bixley v. Wormley*, 44 Iowa, 347.  
Compare *Wormley v. Hamburg*, 46 Id. 144.

<sup>8</sup> *Fuller v. Lendrum*, 58 Iowa, 353.

<sup>9</sup> *Berge v. Rhinehart*, 36 Iowa, 369.

*trust* is still living.<sup>1</sup> And wherever interested parties were recognized as competent, under some exception in the common law, or by previous statutes, they were not excluded by this provision.<sup>2</sup> Thus, the section does not change the common-law rule that a party to a suit may testify to the loss of a note sued on where such evidence is received from necessity and the nature of the subject.<sup>3</sup> So also in an action by the representative against several defendants, one of them who withdrew his defence upon an arrangement that judgment should be taken against him for a certain amount, was held no longer a party, and not rendered incompetent by the statute to testify as to transactions between himself and the deceased.<sup>4</sup> Again, the provision is limited in its application to testimony as to transactions between one at the time of the examination deceased, or insane, and the witness, and does not exclude testimony as to contracts made by the former with another, although the husband or wife of the witness.<sup>5</sup> And the disqualification does not extend to witnesses introduced by the representative to testify in his favor; the word "against" refers to testimony and not to actions against the representative.<sup>6</sup>

On the other hand it has been held that in an action by a personal representative the fact that the matters as to which the defendant wished to testify were connected with transactions of a firm of which the deceased was a member, and that the surviving member of the firm was a witness, did not render the defendant a competent witness.<sup>7</sup> And that one of

<sup>1</sup> *Watson v. Russell*, 18 Iowa, 79.

<sup>2</sup> *Keech v. Cowles*, 34 Iowa, 259; *Rhinehart v. Buckingham*, Id. 409.

<sup>3</sup> *Nash v. Gibson*, 16 Iowa, 305. Following out these principles it has been held that the restrictive provision does not apply to the plaintiff in replevin seeking to recover attached property from the sheriff, the plaintiff in the attachment having died (*Bevan v. Hayden*, 13 Iowa, 122); or to the wife of one seeking to establish a claim against the estate of the deceased (*Shafer v. Dean*, 29 Iowa, 144. See also *Dougherty v. Deeney*, 41 Id. 19; *Campbell v. Mayes*, 38 Id. 392); or to the testimony of a witness, in an action against an administrator *de bonis non*, as to transactions and

conversations with the former administrator (*Dunne v. Deery*, 40 Iowa, 251); or to the testimony of the heir at law, in an action on a note and mortgage, brought by an assignee of the deceased. *Sweezy v. Collins*, 40 Iowa, 540. See also *Miller v. Dayton*, 57 Iowa, 423, where, in an action for the malicious killing of deceased, the defendant was allowed to testify, the court virtually deciding that to kill a man is not "a personal transaction" with him within the meaning of the statute.

<sup>4</sup> *Conger v. Bean*, 58 Iowa, 321.

<sup>5</sup> *Lines v. Lines*, 54 Iowa, 600.

<sup>6</sup> *Leasman v. Nicholson*, 59 Iowa, 259.

<sup>7</sup> *Hosmer v. Burke*, 26 Iowa, 353.

several defendants, in such an action, could not testify to personal transactions with the deceased, although he was not interested in the issue upon which he was called to testify.<sup>1</sup> Even the personal representative himself cannot testify where the adverse party is also an executor or administrator;<sup>2</sup> and where he does testify, in a case where he may do so, the defendant is competent to explain the matters as to which the representative has given his evidence.<sup>3</sup> But where the action is *against* the representative, the plaintiff cannot testify respecting personal transactions between himself and the deceased, even for the purpose of rebutting the testimony of the decedent's widow.<sup>4</sup> Thus, in an action brought against an administrator, to recover upon an implied contract for services rendered the deceased, the plaintiff cannot testify to the facts relied upon to raise the promise.<sup>5</sup> And where a corporation is plaintiff, a stockholder cannot testify respecting a personal transaction between himself and the deceased.<sup>6</sup>

§ 114. **Kansas.** — "No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility."<sup>7</sup>

"No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing

<sup>1</sup> Williams v. Barrett, 52 Iowa, 637.

<sup>2</sup> Schmidt v. Kreismer, 31 Iowa, 479.

<sup>3</sup> Bailey v. Keyes, 52 Iowa, 90.

<sup>4</sup> Caraday v. Johnson, 40 Iowa, 587. Compare Willcox v. Jackson, 51 Iowa, 208.

<sup>5</sup> Peck v. McKean, 45 Iowa, 18; Smith v. Johnson, Id. 308; Wilson v. Wilson, 52 Iowa, 44.

<sup>6</sup> Burlington Bank v. Owen, 52 Iowa, 107.

For decisions under earlier statutes

enabling one party to call the adverse party as a witness, and permitting a party, under certain circumstances, to prove the items of his own account, see Lowe v. Ganby, 1 Morr. 281; Everly v. Cole, 3 Greene, 239; Bacon v. Lee, 4 Iowa, 490; Stevens v. Campbell, 6 Id. 538; Hastings v. Devoran, 7 Id. 319; Holmes v. Budd, 11 Id. 186; Arthur v. Blunt, 12 Id. 200; Barker v. Kuhn, 38 Id. 392.

<sup>7</sup> Comp. Laws, 1881, p. 644, § 3847.

in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner when such surviving partner or joint contractor is an adverse party.<sup>1</sup> If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf of his executors, administrators, heirs at law, next of kin, assignee, surviving partner or joint contractor, the other party, or the assignor, shall be competent to testify as to any and all matters to which the testimony so taken relates."<sup>2</sup>

"The following persons shall be incompetent to testify: *First.* Persons who are of unsound mind at the time of their production for examination. *Second.* Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. *Third.* Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards. *Fourth.* An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent. *Fifth.* A clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession. *Sixth.* A physician or surgeon, concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge, obtained by a personal examination of any such patient: *Provided,* That if a person offer himself as a witness, that is to be deemed a consent to the examination, also, of an attorney, clergyman or priest, physician or surgeon, on

<sup>1</sup> See *Hook v. Bixby*, 13 Kan. 164.

<sup>2</sup> Comp. Laws, 1881, § 3850.

the same subject, within the meaning of the last three subdivisions of this section.”<sup>1</sup>

Under the previous statute,<sup>2</sup> a party could testify in his own cause, provided he gave reasonable notice to his adversary of his intention so to do.<sup>3</sup>

Section 3850 does not prohibit a party sued by an administratrix for a debt due the deceased from testifying as to any question raised by the issues, where such testimony is not in respect to any transactions or communication had personally by such party with deceased.<sup>4</sup> And in such a case, the plaintiffs being the administratrix of a deceased partner, and the surviving partner, the defendant may testify to all matters in controversy which have transpired since the deceased partner died, and as to all matters respecting which the surviving partner has testified, and that a book offered by him (the defendant) was his book of original entries.<sup>5</sup> And in case he is called by the other party to testify as to a part of any transaction with the deceased partner or joint contractor, he may go on, in his own behalf, and testify as to the remainder of such transaction.<sup>6</sup> Where two join in a suit against a personal representative, each of whom is incompetent to testify to conversations between himself and the deceased, neither can testify as to a conversation between the deceased and the other plaintiff, at which the three were present.<sup>7</sup> The defendant being an executor, he is a competent witness in favor of the estate, and so is a devisee, or the husband or wife of a devisee.<sup>8</sup> Thus, where a suit is revived in the name of plaintiff's widow, as his executrix, she is a competent witness as to all matters, except communications between herself and him during marriage; but the defendant is not competent to testify to any transaction personally had with the decedent.<sup>9</sup>

§ 115. **Kentucky.** — “No person shall be disqualified as a witness, in any civil action or special proceeding, by reason of his interest in the event of the same as a party or otherwise; but such interest may be shown for the purpose of affecting his credibility.”<sup>10</sup>

<sup>1</sup> *Ibid.* § 3851.

<sup>2</sup> Code, 1858, §§ 310, 313.

<sup>3</sup> *Mallory v. Leiby*, 1 Kan. 97.

<sup>4</sup> *McKean v. Massey*, 9 Kan. 600.

<sup>5</sup> *Anthony v. Stinson*, 4 Kan. 211.

<sup>6</sup> *Niccolls v. Esterley*, 16 Kan. 32.

<sup>7</sup> *Wills v. Wood*, 28 Kan. 400.

<sup>8</sup> *McCartney v. Spencer*, 26 Kan. 62.

<sup>9</sup> *Jaquith v. Davidson*, 21 Kan. 341.

<sup>10</sup> Gen. Stat. 1881, p. 413, § 22.

“Neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other, during marriage, whether called while that relation subsisted or afterwards: *Provided, however,* That in actions where the wife, were she a *feme sole*, would be plaintiff or defendant, the wife may testify, or her husband may testify, but both shall not be permitted to testify.”<sup>1</sup>

“No party shall be allowed to testify by virtue of section twenty-two, in any action or special proceeding where the adverse party is deaf and dumb, or an infant, (unless the infant testifies in his own behalf,) or is the guardian or trustee of a child or children of a deceased person, or is the committee of an idiot or lunatic, or is the executor or administrator of a deceased person, or is the party claiming as heir or devisee of a deceased person, except in the following cases, viz.: (1) In actions or special proceedings with the executor, administrator, guardian, or trustee of infants, heir, or devisee, as above specified, a party may testify to facts which occurred after the death of the decedent or parent. (2) In actions or special proceedings upon contracts made by deceased persons through agents, and in which the agent shall testify, a party may testify to all that transpired between him and the agent in relation to such contract and the making thereof, and in relation to any conversations or transactions between himself and such agent testified to by the agent. (3) In actions or special proceedings of either of the classes above specified, in which any adverse party, or any other person having a direct interest in the matter in controversy, shall be called as a witness, and testify to transactions or conversations with a party to such action, such party shall also be permitted to testify as to such specific transactions and conversations. (4) In actions or special proceedings of either of the classes above specified, in which one party calls a witness (other than an agent or person interested) to prove conversations or admissions of the opposite party, occurring before the death of said deceased person, but not in his presence, the opposite party may testify as to the same conversations or admissions. (5) In actions or special proceedings of either of the classes above specified, in which the claim or defence is founded on book account, a

<sup>1</sup> *Ibid.* § 24.

party may testify as to the correctness of the original entries, if made by himself; and on such authentication of the account book and entries, said book and entries shall be admissible as evidence in the case. (6) If the deposition of a party who has died during the pendency of the suit shall be given in evidence on the trial of such cause, the opposite party may testify as to all matters contained in said deposition, and not excluded by irrelevancy or inadmissibility. In all actions or special proceedings by or against a surviving partner or partners, or a surviving joint contractor or contractors, no adverse party to the suit shall be a competent witness to testify to transactions, or declarations, or admissions made by the deceased in the absence of his surviving partner or joint contractor.”<sup>1</sup>

“No person who would, if a party, be incompetent to testify under the provisions of section 25 of this chapter, shall become competent by reason of the assignment of his claim.”<sup>2</sup>

“No person shall be deemed competent to testify, in behalf of his own interest, and against the interest of an adverse party, in any action or special proceeding in which such adverse party is not before the court otherwise than by constructive service.”<sup>3</sup> No one shall be incompetent as a witness because of his or her race or color.<sup>4</sup>

Under section 25, cited *supra*, the courts have held that an administrator is not a competent witness against the infant children of his intestate, in an action by them, by guardian or next friend, against him, to recover rents which he had collected for lands leased by him, which had descended to them.<sup>5</sup> Nor can an executor, when sued as such by the executor of another, testify as to transactions between himself and plaintiff's testator.<sup>6</sup> So also, a distributee cannot testify for the administrator, in an action by the latter against the representative of another deceased person.<sup>7</sup> But in a contest over the probate of a will, it has been held that one of the devisees may testify as to transactions between himself and the testator, all the claimants under the will being entitled

<sup>1</sup> *Ibid.* § 25.

<sup>2</sup> *Ibid.* § 26.

<sup>3</sup> *Ibid.* § 27.

<sup>4</sup> *Ibid.* § 28.

<sup>5</sup> *Wilson v. Unselt*, 12 Bush, 215.

<sup>6</sup> *Hobbs v. Russell*, 79 Ky. 61.

<sup>7</sup> *Manion v. Lambert*, 10 Bush, 295.

to the same privilege. All the parties are thus placed upon an equal footing, thus creating an exception to the rule against permitting parties in interest to testify.<sup>1</sup>

The fact that the personal representative has testified confers no right on the adverse party to testify, save as to those things to which his testimony related.<sup>2</sup> Where the principal in the transaction in question is dead, the rule of exclusion applies also to transactions with his agent who is dead; and the fact that the agent testified at a former trial does not change the rule.<sup>3</sup>

§ 116. *Louisiana.* — "The competent witness of any covenant, or fact, whatever it may be in civil matters, is a person of proper understanding. The husband cannot be a witness for or against his wife, nor the wife for or against her husband, but in any case where the husband and wife may be joined as plaintiffs or defendants, and have a separate interest, they shall be competent witnesses for or against their separate interests therein."<sup>4</sup>

The fact that the witness's testimony may show that he has been guilty of an offence against the laws of the state, will not prevent him from testifying, unless he himself objects.<sup>5</sup>

<sup>1</sup> *Flood v. Pragoff*, 79 Ky. 607. See also *Booth v. Vanarsdale*, 9 Bush, 717.

<sup>2</sup> *Hardin v. Taylor*, 78 Ky. 593. But see *Eaves v. Harbin*, 12 Bush, 445.

<sup>3</sup> *Harpending v. Daniel*, 80 Ky. 449.

For decisions under earlier statutes, see *Covington & C. R. R. Co. v. Ingles*, 15 B. Mon. 637; *Todd v. Luckett*, 18 Id. 125; *Allen v. Shelby*, 14 Id. 340; *Burnett v. Garnett*, 18 Id. 68; *Musick v. Ray*, 3 Metc. 427.

<sup>4</sup> Rev. Stat. 1876, § 3961. As to husband and wife, see *infra*, Chap. X.

<sup>5</sup> *Horrell v. Parish*, 26 La. Ann. 6.

For decisions illustrating the civil law practice of examining the adverse party by commission by means of written interrogatories, see the cases indexed below:—

*Right to propound interrogatories.* *Walker v. Copley*, 1 La. Ann. 247; *Kenner v. Peck*, 2 Id. 936; *McGehee v. Brown*, 3 Id. 272; *Rachal v. Rachal*, 4 Id. 500; *Guier v. Guier*, 7 Id. 103; *Billeaudeau v. Keller*, 8 Id. 487; *Meyer*

*v. Eckless*, 10 Id. 626; *Semere v. Semere*, Id. 704; *Kelly v. Ledoux*, 11 Id. 689; *Huff v. Freeman*, 13 Id. 262; *Saunders v. Carroll*, 14 Id. 27; *Shepherd v. Payson*, 16 Id. 360; *Butler v. Stewart*, 18 Id. 554; *State v. Fahey*, 35 Id. 9.

*Time to apply to interrogate.* *Brooks v. Walker*, 3 La. Ann. 150; *Coulter v. Cresswell*, 7 Id. 367; *Leggett v. Potter*, 9 Id. 184.

*Form and sufficiency of interrogatories.* *Gilmore v. Brenham*, 3 La. Ann. 32; *Levistones v. Marigny*, 13 Id. 353.

*Service, and time to answer.* *Wall v. Bry*, 1 La. Ann. 312; *Demoulin v. Anglaire*, Id. 403; *McIntosh v. Smith*, 2 Id. 756; *Wethersby v. Huddleston*, Id. 845; *Spears v. Nugent*, Id. 11; *Medley v. Wetzler*, 5 Id. 217; *Dwight v. Richard*, Id. 365; *Flower v. Downs*, 6 Id. 539; *Wright v. Abbott*, Id. 569; *Taylor v. Paterson*, 9 Id. 251; *Blauchin v. Pickett*, 21 Id. 680.

*Form and sufficiency of answers.*



§ 117. **Maine.** — “No person shall be deemed an incompetent witness on account of his religious belief, but shall be subject to the test of credibility; and any person who does not believe in the existence of a Supreme Being, shall be permitted to testify under solemn affirmation, and shall be subject to all the pains and penalties of perjury.”<sup>1</sup>

“No person shall be excused or excluded from being a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in the event thereof as party or otherwise, except as is hereinafter provided, but such interest may be shown for the purpose of affecting his credibility; and the husband or wife of either party may be a witness when either is called to testify with the consent of the other.”<sup>2</sup>

“The provisions of the five preceding sections shall not be applied to any cases, where, at the time of taking testimony, or the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or an administrator, or made a party as heir of a deceased party; except in the following cases: (1) The deposition of a party may be used at the trial, after his death, if the opposite party is then alive; and in that case the latter may also testify. (2) In all cases in which an executor, administrator, or other legal representative of a deceased person is a

Haynes *v.* Heard, 3 La. Ann. 648; Amonett *v.* Fisk, 4 Id. 342; Owen *v.* Brown, 13 Id. 201; Boone *v.* Pelichet, Id. 203; Peters *v.* Gibson, 11 Id. 97; Bowers *v.* Hale, 14 Id. 419; Tegarden *v.* Powell, 15 Id. 184; Quirk *v.* Hoskins, Id. 656; Braxton *v.* Bloom, Id. 618; Woodruff *v.* Dodd, Id. 644; Maduel *v.* Mousseau, 28 Id. 691.

*Conclusiveness and effect of answers as evidence.* Johnson *v.* Marsh, 2 La. Ann. 772; Morrill *v.* Carr, Id. 807; Sullivan *v.* Williams, Id. 876; Whiting *v.* Ivey, 3 Id. 649; Graham *v.* Benjamin, 5 Id. 186; Hoover *v.* Miller, 6 Id. 204; Commercial Bank *v.* Routh, 7 Id. 128; Walker *v.* Wingfield, 16 Id. 300; Marionneaux *v.* Edwards, 4 Id. 103; Conrey *v.* Harrison, Id. 349; Fletcher *v.* Fletcher, 5 Id. 406; Prater *v.* Pritchard, 6 Id. 730; Brander *v.* Lum, 11 Id. 217; Allen *v.*

May, Id. 627; Knox *v.* Thompson, 12 Id. 114; Swan *v.* Moore, 14 Id. 833; State *v.* Harvey, 28 Id. 105; Lamp-ton's Succession, 35 Id. 418.

*How the examination should be conducted.* Nicholson *v.* Sherard, 10 La. Ann. 533; Kirtland *v.* Harris, 20 Id. 153; McDonald *v.* Wells, 23 Id. 189.

*Objections for irregularity, etc.* Ferrier *v.* Latting, 9 La. Ann. 169; Hall *v.* Acklen, Id. 219; McClure *v.* King, 13 Id. 141; Pickett *v.* Vance, 14 Id. 668; Morris *v.* White, 28 Id. 855.

*Incidental matters of practice.* Seaman *v.* Babington, 11 La. Ann. 173; Huff *v.* Freeman, 15 Id. 240; Lapene *v.* Riche, Id. 612; Bramstein *v.* Crescent Mutual Ins. Co., 24 Id. 589; Cain *v.* Loeb, 26 La. Ann. 616.

<sup>1</sup>Rev. Stat. 1881, p. 650, § 81.

<sup>2</sup>*Ibid.* § 82.

party, such party may testify to any facts, legally admissible upon the general rules of evidence, happening before or after the death of such person; and when such person so testifies, the adverse party shall neither be excluded nor excused from testifying in reference to such facts. (3) If the representative party is nominal only, both parties may be examined as witnesses; if the adverse party is nominal only, and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he shall not be excluded from testifying if called by either party; and in an action against an executor or administrator, if the plaintiff is nominal only, or having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record shall be excused or excluded from testifying. (4) In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account-books or other memoranda are used as evidence on either side, the other party may testify in relation thereto."<sup>1</sup>

"The rules of evidence which apply to actions by or against executors or administrators, shall be applied in actions where a person shown to the court to be insane is solely interested as a party."<sup>2</sup>

In applying sections 82 and 87 above cited, or the prior like statutory provisions,<sup>3</sup> it has been held that a husband or wife can testify with the consent of the other, but not against an executor, etc.;<sup>4</sup> that the restrictive provision covers the case of the executor of one who is in prison under sentence of death;<sup>5</sup> and that an interested witness who is not a party is not an incompetent witness, even though one party is an administrator.<sup>6</sup>

<sup>1</sup> *Ibid.* p. 651, § 87.

<sup>2</sup> *Ibid.* p. 652, § 88. For decisions under earlier statutes, now mostly obsolete, see *Morse v. Page*, 25 Me. 496; *State v. Pike*, 33 Me. 361; *Swett v. Stubbs*, Id. 481; *Blake v. Junkins*, 34 Me. 237; *Haynes v. Rowe*, 40 Me. 181; *Fogg v. Babcock*, 41 Me. 347; *Wheelden v. Wilson*, 44 Me. 11; *Murray v. Joyce*, Id. 342; *Gunnison v. Lane*, 45 Me. 165; *Palmer v. Bangor*, 46 Me. 325; *Walker v. Sanborn*, Id. 470; *Carlisle v. McNamara*, 48 Me. 424; *Bucknam v. Perkins*, 55 Me.

490; *Gould v. Carleton*, Id. 511; *Payne v. Gray*, 56 Me. 317; *Folsom v. Chapman*, 59 Me. 194; *Blanchard v. Hodgkins*, 62 Me. 119.

<sup>3</sup> Rev. Stat. 1871, ch. 82, §§ 82, 87.

<sup>4</sup> *Jones v. Simpson*, 59 Me. 180; *Hunter v. Lowell*, 64 Me. 572. But see *McKeen v. Frost*, 46 Me. 239; *Dwelly v. Dwelly*, Id. 377.

<sup>5</sup> *Knight v. Brown*, 47 Me. 468.

<sup>6</sup> *Rawson v. Knight*, 73 Me. 340. *S. P. Alden v. Goddard*, Id. 345. See also *Wentworth v. Wentworth*, 71 Me. 72.

Subdivision 2 of section 87 is held to be in derogation of the common law, and must be construed strictly, so as to import that the adverse party cannot testify unless the administrator offers to testify;<sup>1</sup> and then only in reference to such facts as the administrators or heirs testify to, or in regard to such books or memoranda of the deceased as they put in evidence.<sup>2</sup> And even the personal representative cannot testify in support of his own private claim against the estate which he nominally represents, for in such a case the estate is the real defendant against which he is proceeding as plaintiff.<sup>3</sup>

§ 118. **Maryland.** — “No person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the courts, in the trial of any issue joined, or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, justice of the peace, or other person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; but no person who has been convicted of the crime of perjury, shall be admitted to testify in any case or proceeding whatever; and the parties litigant, and

<sup>1</sup> *Kelton v. Hill*, 59 Me. 259.

<sup>2</sup> *Subd. 4; Burleigh v. White*, 64 Me. 23.

<sup>3</sup> *Preble v. Preble*, 73 Me. 362. As to the competency of a surviving partner in an action wherein the representative of a deceased partner is a party, see *Holmes v. Tenney*, 68 Me. 416; *Berry v. Stephens*, 69 Me. 290. As to when the administrator is only a nominal party within subd. 3 of § 87, see *Farnum v. Virgin*, 52 Me. 576. Under subd. 4 of the same section it has been held that where plaintiff sues for labor and services rendered

the deceased, unless the entries in his books of account are intelligible in themselves as setting forth in substance the facts constituting a right of action in his favor against deceased, the explanation of such entries must come from witnesses other than himself. He cannot testify that the charges, which apparently represent services rendered for third persons or which do not indicate that they were rendered to deceased, were in fact so rendered. *Silver v. Worcester*, 72 Me. 322.

all persons in whose behalf any suit, action, or other proceeding may be brought or defended, themselves and their wives and husbands shall be competent and compellable to give evidence in the same manner as other witnesses, except as hereinafter excepted.”<sup>1</sup> The exceptions are so similar to some we have already examined,<sup>2</sup> that it would be a waste of space to repeat them here.

Under the inhibition against testimony as to transactions and communications with deceased persons, it has been held that if the personal representative, either on his own offer or on the call of his co-plaintiff or co-defendant, give in evidence, adversely to his opponent, any conversation he may have had with the latter, in reference to the cause of action or controversy, then the other party, likewise on his own offer, or on the call of his co-plaintiff or co-defendant, may testify in respect to such conversations or admissions, by giving such evidence as will fairly tend to contradict, explain, or modify them; but beyond this the latter cannot go.<sup>3</sup> And the testimony of one party taken prior to the death of the other, and admissible when taken, is not rendered inadmissible by the decease of the other party.<sup>4</sup> So, also, where the transaction between the witness and the deceased person is only incidentally involved, the witness is competent.<sup>5</sup> And the action being by a corporation against the executor of one deceased, a stockholder in the plaintiff, is not deemed a party to the action within the statute.<sup>6</sup> The statute providing that where one of two original parties to a contract is dead, the other cannot testify, on his own offer, in an action on the contract, applies to an agent who contracts in his own name, without disclosing his agency;<sup>7</sup> and to the administrator defendant, where the estate of one of two defendants, both dead, is sued.<sup>8</sup> But the statute was held not to apply to the parties to a contract made with a partnership, simply because one of the partners, who was a non-resident and not actively engaged in the business, had died since the contract was made.<sup>9</sup> Nor to parties interested as devisees, so as to preclude them

<sup>1</sup> Rev. Code, 1878, p. 749, § 1.

<sup>2</sup> *Supra*, § 103, p. 159.

<sup>3</sup> *Johnson v. Heald*, 33 Md. 352.

<sup>4</sup> *Armitage v. Snowden*, 41 Md. 119.

<sup>5</sup> *Diffenback v. New York Life Ins. Co.*, 61 Md. 370.

<sup>6</sup> *Downes v. Maryland &c. R. R. Co.*, 37 Md. 100.

<sup>7</sup> *Stanford v. Horwitz*, 49 Md. 525.

<sup>8</sup> *Orendorff v. Utz*, 48 Md. 298.

<sup>9</sup> *Hardy v. Chesapeake Bank*, 51 Md. 502.

from testifying adversely to a claim made by the executor for services rendered the testator.<sup>1</sup> Nor to a mortgagor, the mortgagee being dead, in a contest between the holders of two mortgages, to determine the question of priority.<sup>2</sup> Nor to a widow, in a proceeding to set aside a *pro confesso* decree of sale of land, under a deed of trust alleged by her to have been executed by her under duress of threats by her husband.<sup>3</sup>

§ 119. **Massachusetts.** — “No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence as a witness in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: (1) Neither husband nor wife shall be allowed to testify as to private conversations with each other. (2) Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other. (3) In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him.”<sup>4</sup>

“The conviction of a witness of a crime may be shown, to affect his credibility.”<sup>5</sup>

The first paragraph of section 18, above quoted, together with the substance of section 19, were enacted as early as 1860.<sup>6</sup> Personal representatives were made competent in 1864.<sup>7</sup> Very many decisions appear in the books interpreting and applying these earlier provisions, but the present condition of the written law of this State is so plain and

<sup>1</sup> Bantz v. Bantz, 52 Md. 686.

<sup>2</sup> Swartz v. Chickering, 58 Md. 290. See also Wright v. Gilbert, 51 Md. 146; Spencer v. Trafford, 42 Md. 1.

<sup>3</sup> Washington First Nat. Bank v. Eccleston, 48 Md. 145. [Alvey and Robinson, JJ., dissenting.] S. P. Sanborn v. Lang, 41 Md. 107. But see Redgrave v. Redgrave, 38 Md. 93.

For decisions under earlier statutes, now superseded, see Greenleaf v. Brith, 5 Pct. (U. S.) 132; Hayward

v. Carroll, 4 Har. & J. 518; Hatton v. McClish, 6 Md. 407; Broadbent v. State, 7 Md. 416; Morrison v. Hammond, 27 Md. 604; Mason v. Poulson, 43 Md. 161.

<sup>4</sup> Pub. Stat. 1882, ch. 169, p. 987, § 18.

<sup>5</sup> *Ibid.* § 19.

<sup>6</sup> Gen. Stat. 1860, ch. 131, p. 672, § 13.

<sup>7</sup> Laws 1864, p. 291, ch. 304, § 1. See also Laws 1865, p. 609, ch. 207, §§ 1, 2.

simple, and so completely sweeps away all the common-law barriers surrounding the witness-box, that most of these cases have become, in this respect, completely obsolete and valueless. Such of them, however, as are deemed of any utility as developing the gradual and steady endeavor of the courts to conform to the repeated changes made by statute in the previous law, are listed below.<sup>1</sup>

§ 120. **Michigan.** — "No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime or for any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit, or proceeding, in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime, may be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided."<sup>2</sup>

<sup>1</sup> As to the competency of parties to the litigation, generally. Chase v. Breed, 5 Gray, 440; Fischer v. Morse, 9 Id. 440; Hosmer v. Warner, 15 Id. 46; Smith v. Smith, 1 Allen, 231; Kendall v. May, 10 Id. 59; Granger v. Basset, 98 Mass. 462.

*Right to examine adverse party on interrogatories.* Robbins v. Holman, 11 Cush. 26; Sheldon v. Kendall, Id. 74; Townsend v. Gibbs, Id. 158; Wilson v. Webber, 2 Gray, 558; Hubbard v. Hubbard, 6 Id. 362; Kennedy v. Gooding, 7 Id. 417; Amherst &c. R. R. Co. v. Watson, 8 Id. 529; Foss v. Nutting, 14 Id. 484; Hobbs v. Stone, 5 Allen, 109.

*Competency of parties in cases of usury.* King v. Howard, 1 Cush. 137; Gifford v. Whitcomb, 9 Id. 482; Cutler v. Barbier, 4 Gray, 588.

*Parties to suits on bills and notes.* Reed v. Boardman, 20 Pick. 441; Bacon v. Robinson, 7 Cush. 579; Kendall v. Robertson, 12 Id. 156; Byrne v. McDonald, 1 Allen, 293; Hubbard v. Chapin, 2 Id. 328.

*Interested witness not joined, not served, or defaulted.* Bull v. Strong, 8 Metc. 8; Jennings v. Fisher, 7 Cush. 239; Palmer v. White, 10 Id. 321; Morgan v. Stone, 11 Id. 253.

*Effect of death of one party on competency of opposite party.* Palmer v. Kellogg, 11 Gray, 27; Bacon v. Williams, Id. 222; Lincoln v. Lincoln, 12 Id. 45; Jones v. Wolcott, 15 Id. 541; Pettigill v. Porter, 3 Allen, 349; Green v. Gould, Id. 465; Gay v. Gay, 5 Id. 157; Doody v. Pierce, 9 Id. 141; Farrelly v. Ladd, 10 Id. 127; Brown v. Brightman, 11 Id. 226.

*Competency of the personal representative.* Dascomb v. Davis, 5 Metc. 335; Wood v. Gannett, 4 Gray, 450; Baxter v. Abbott, 7 Id. 71; Blood v. French, 9 Id. 197; Howe v. Merrick, 11 Id. 129.

*Husband or wife, or widow.* Barber v. Goddard, 9 Gray, 141; Snell v. Westport, Id. 321; Ayres v. Ayres, 11 Id. 130; Little v. Little, 13 Id. 264; Litchfield v. Merritt, 102 Mass. 520.

*Surviving partners.* Hayward v. French, 12 Gray, 453; Brady v. Brady, 8 Allen, 101.

*Joint contractors.* Goss v. Austin, 11 Allen, 525.

*Trustees.* Brooks v. Tarbell, 103 Mass. 496.

<sup>2</sup> Mich. Comp. L. § 4339, as amended by Laws 1861, p. 168, No. 125, § 1.

“On the trial of any issue joined, or any matter, suit, or proceeding, in any court, or on any inquiry arising in any suit or proceeding in any court, or before any officer or person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit or proceeding is prosecuted or defended, may be witnesses therein in their own behalf or otherwise, in the same manner as other witnesses, except as hereinafter otherwise provided, and the deposition or any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against, and compelled to attend and testify, as is provided by law for other witnesses. Nothing in this act shall be construed as giving the right to compel a defendant in criminal cases to testify, but any such defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined upon any such statement.”<sup>1</sup>

“That when a suit or proceeding is prosecuted or defended by the representative of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person.”<sup>2</sup>

“A husband shall not be examined as a witness for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor shall either, during the marriage or afterwards, be, without the consent of both, examined as to any communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery, the husband and wife shall not be competent to testify.”<sup>3</sup>

The above statute prescribes the only rule as to the competency and examination of parties as witnesses.<sup>4</sup> And under section 4342, the testimony of one who was formerly the defendant's wife, but who has obtained a divorce, as to a transaction between defendant and a third person, is not within the prohibition as a “communication made by one to the other during the marriage.”<sup>5</sup>

<sup>1</sup> § 4340, as amended by Id. § 2.

<sup>4</sup> *Gooderich v. Allen*, 19 Mich. 250.

<sup>2</sup> § 4341, as amended by Id. § 3.

<sup>5</sup> *Herrick v. Odell*, 29 Mich. 47. For decisions under earlier statutes, see

<sup>3</sup> § 4342, as amended by Id. § 4.

In construing section 4341, as amended in 1861, the courts have held the admissibility of the surviving party's testimony not to depend upon the degree of knowledge as to the transaction possessed by the deceased person; but that such testimony is to be confined strictly to facts not within the knowledge of the deceased.<sup>1</sup> Whether that section has any application to written documents, *quære*? It has not where the representatives have the means of proving the document by independent evidence.<sup>2</sup>

This section was virtually re-enacted in 1871,<sup>3</sup> and as so re-enacted was held not to apply to what occurred in the absence of the deceased, such as the forwarding of goods to him while out of the State, their value, cost of transportation, etc., and matters not specially or at all known to the deceased.<sup>4</sup> Or to controversies with third persons acting in their own right, as purchasers during the life of the deceased, and not taking by any post-mortem estate.<sup>5</sup> Or where the transaction was between the surviving party on one side, and a surviving agent of the decedent on the other, and in the presence of other persons, but not of the decedent.<sup>6</sup> Or to actions against a private corporation, so as to preclude the corporators from testifying to matters equally within the knowledge of the plaintiff's testator or intestate.<sup>7</sup> Or to a case where the beneficiary under the will of the heir is the party on one side, and the administrators of the estate are the parties on the other side.<sup>8</sup>

On the other hand, the suit being between the administrator and a son of the deceased, involving the title to personal property claimed by the administrator to belong to the estate, the son is precluded from testifying, as to conversations between himself and his father, in the latter's lifetime.<sup>9</sup> And the inhibition applies to oral evidence of the contents of lost letters, which passed between the party and the deceased.<sup>10</sup> It applies to an heir who sues as administratrix of another estate, but not to an heir and distributee who has assigned

Howard v. Palmer, Walk. 391; Brooks v. Intyre, 4 Mich. 316; McBride v. Cicotte, Id. 478; Hogan v. Sherman, 5 Id. 60.

<sup>1</sup> Kimball v. Kimball, 16 Mich. 211

<sup>2</sup> Moulton v. Mason, 21 Mich. 364.

<sup>3</sup> Comp. L. 1871, § 5968.

<sup>4</sup> Wheeler v. Arnold, 30 Mich. 304.

<sup>5</sup> Twiss v. George, 33 Mich. 253.

<sup>6</sup> Ward v. Ward, 37 Mich. 253.

<sup>7</sup> Rust v. Bennett, 39 Mich. 521.

<sup>8</sup> Mower's Appeal, 48 Mich. 441.

<sup>9</sup> Chambers v. Hill, 34 Mich. 523.

<sup>10</sup> Schratz v. Schratz, 35 Mich. 485.



her claim, and is not interested in the event of the suit.<sup>1</sup> So, also, it applies where the testimony of the surviving party is introduced in order to supplement that of other persons, insufficient in itself to establish a case.<sup>2</sup> And to the case of a third person who intervenes as claimant of the note sued on by the representative, and takes upon himself the defence of the action.<sup>3</sup>

The disability imposed upon the surviving party is not removed by the fact that third persons were present, but knew nothing of vital facts of the transaction. Thus, where one having a demand against a decedent for money claimed to have been loaned, presented witnesses who were present and saw money paid, but knew nothing of the circumstances or transaction except the mere passing of the money, it was held, after reviewing the previous decisions, that the survivor was not competent to testify in explanation of the payment, and that it was a loan.<sup>4</sup>

But where a party whose testimony, if objected to, would be excluded under the provisions of the statute, is giving testimony in a cause, and the opposite party calls out facts equally within the knowledge of the deceased, and afterwards seeks to prove the statements so made under oath in a controversy between the same parties as admissions, he must be held to have waived the inhibition of the statute, and the witness may testify fully in respect to the subject-matter of the admission, although it be equally within the knowledge of the deceased.<sup>5</sup>

§ 121. **Minnesota.**—“All persons, except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief, although, in every case, the credibility of of the witnesses may be drawn in question. And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his request, but not

<sup>1</sup> Howard v. Patrick, 38 Mich. 795.

<sup>4</sup> Downey v. Andrus, *supra*, followed

<sup>2</sup> Downey v. Andrus, 43 Mich. 65; in Chadwick v. Chadwick, 18 Id. s. c., 4 N. W. Rep. 628.

350.

<sup>3</sup> Bachelder v. Brown, 47 Mich. 366, <sup>5</sup> Smith's Appeal, 18 N. W. Rep. 195. Campbell, J., dissenting.

otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court.”<sup>1</sup>

“It shall not be competent for any party to an action, or person interested in the event thereof, to give evidence therein, of or concerning any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties.”<sup>2</sup>

“The following persons are not competent to testify in any action or proceeding. (1) Those who are of unsound mind, or intoxicated, at the time of their production for examination. (2) Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.”<sup>3</sup>

Under section 8 it has been held that a party or person interested may testify as to any *acts* of a deceased or insane person, although such acts may have in law the effect of admissions. It is only as to conversations or oral admissions that the evidence is excluded.<sup>4</sup> Where the contract in suit was made by an agent of the deceased, and the agent has testified, the other party to the contract is competent.<sup>5</sup>

The disqualifying interest which will exclude the witness is such an interest only in the event of an action or proceeding that the witness having it will either gain or lose by the direct legal operation of the judgment therein obtained, or may be prejudiced in some right by the use of the judgment as evidence for or against him in some other action or proceeding. So, where, in a proceeding by an administrator *de bonis non* against an administratrix who had been removed, for a final settlement of her accounts, it becomes collaterally a material question whether a partnership existed between a certain party and the decedent, such party is a competent witness touching conversations and transactions between him and decedent tending to show that fact, when the witness is neither a party nor in privity with either of the parties to

<sup>1</sup> Stat. 1878, p. 792, § 7.

<sup>2</sup> *Ibid.* § 8. See *Griswold v. Edson*,  
21 N. W. Rep. 475.

<sup>3</sup> *Ibid.* § 9.

<sup>4</sup> *Chadwick v. Cornish*, 26 Minn. 28.

<sup>5</sup> *McNab v. Stewart*, 12 Minn. 407.  
See also *Johnson v. Coles*, 21 Id. 108;  
*Marvin v. Dutcher*, 26 Id. 391.

the proceeding, and has no interest in the estate as next of kin, heir, creditor, or otherwise.<sup>1</sup>

§ 122. **Mississippi.** — “No person, whether a party to the suit or otherwise, shall be incompetent to give evidence in any suit at law or in equity, by reason of any interest in the result thereof, or in the record as an instrument of evidence in other suits; and the court or jury shall give such weight to the testimony of parties and interested witnesses, as in view of the situation of the witness, and other circumstances, it may be fairly entitled to. Any party may, by subpœna, as in other cases, compel any other party to the suit to appear and give evidence.”<sup>2</sup>

“No conviction of any person for any offence, except perjury, and subornation of perjury, shall disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. No person convicted of perjury or subornation of perjury, shall afterwards be a competent witness in any case, although pardoned or punished for the same.”<sup>3</sup>

“No person shall be incompetent as a witness because of defect of religious belief.”<sup>4</sup> .

Under section 1600, a person under sentence of death for murder is a competent witness. The word “conviction” in that section includes sentence.<sup>5</sup>

§ 123. **Missouri.** — “No person shall be disqualified as a witness in any civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same as a party or

<sup>1</sup> *In re Dutcher*, 4 N. W. Rep. 685.

<sup>2</sup> Rev. Code, 1880, § 1599.

<sup>3</sup> *Ibid.* § 1600.

<sup>4</sup> *Ibid.* § 1604.

<sup>5</sup> *Keithler v. State*, 10 Sm. & M. 192.

As to the right of one party or an interested witness to testify in support of his own claim in an action prosecuted or defended by the personal representatives of a deceased adversary, see the following cases, where the competency of the witness was sustained. *Witherspoon v. Blewlett*, 47 Miss. 570; *Stadeker v. Jones*, 52 Id. 729; *Love v. Stone*, 50 Id. 449; *Rothschild v. Hatch*, 54 Id. 554; *Mitchell v. Savings Inst.*, 56 Id. 444; *Gordon v. McEachin*, 57 Id. 834;

*Fennell v. McGowan*, 58 Id. 261; and the following, where the testimony was rejected: *Griffin v. Lower*, 37 Miss. 458; *Otey v. McAfee*, 38 Id. 348; *Lamar v. Williams*, 39 Id. 342; *Wood v. Stafford*, 50 Id. 370; *Jacks v. Bridewell*, 51 Id. 881; *Rushing v. Rushing*, 52 Id. 329; *Jones v. Sherman*, 56 Id. 559; *Duncan v. Gerdine*, 59 Id. 550; *Troup v. Price*, 55 Id. 278.

In suits by or against surviving partners, see *Faler v. Jordan*, 44 Miss. 283; *McCutchin v. Rice*, 56 Id. 455.

When the husband, wife, or widow may testify in such cases, see *Whitfield v. Whitfield*, 44 Miss. 254; *Rushing v. Rushing*, 52 Id. 329; *Buckingham v. Wesson*, 54 Id. 526.

otherwise, but such interest may be shown for the purpose of affecting his credibility: *provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator: *provided, further*, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no further.”<sup>1</sup>

“Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses: *provided*, that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses.”<sup>2</sup>

“No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: *first*, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; *second*, in actions against carriers, so far as relates to the loss of property and the amount and value thereof; *third*, in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband; and no married man shall be disqualified as a witness in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party, when such suit or proceeding is based upon,

<sup>1</sup> Rev. Stat. 1879, § 4010.

<sup>2</sup> *Ibid.* § 4012.

grows out of, or is connected with, any matter of business or business transaction, where the transaction or business was had with or was conducted by such married man as the agent of his wife: *provided*, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admission or conversations of her husband, whether made to herself or to third parties.”<sup>1</sup>

“The following persons shall be incompetent to testify: *first*, a person of unsound mind at the time of his production for examination; *second*, a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; *third*, an attorney concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client; *fourth*, a minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination; *fifth*, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.”<sup>2</sup>

As early as 1870 it was held that the provision forbidding a party to testify when it is shown that one of the original parties to the contract or cause of action in issue and on trial, is dead, etc., relates wholly to persons who are parties to the issue which is on trial, and not to those who were parties to the original contract merely.<sup>3</sup> The provision does not exclude the children of the living party;<sup>4</sup> nor the beneficiaries under

<sup>1</sup> *Ibid.* § 4014.

<sup>2</sup> *Ibid.* § 4017.

As to the right of one party to call and examine the adverse party, under statutes prior to the passage of § 4012, see *Musick v. Musick*, 7 Mo. 495; *Levy v. Hawley*, 8 Mo. 510; *Grigg v. Bodrio*, 9 Mo. 223; *Christie v. Horne*, 24 Mo. 242; *Fagan v. Long*, 30 Mo. 222; *Pratte v. Coffman*, 33 Mo. 71. Before this section was passed, under the practice act, interest in the event went to the credibility only. The

*Madison v. Wells*, 14 Mo. 360; the witness was competent unless a party to the action, or a person for whose immediate benefit it was prosecuted or defended. *Bates v. The Madison*, 18 Mo. 99; *Mudd v. Bast*, 34 Mo. 465. See also the following cases: *Page v. Butler*, 15 Mo. 73; *Young v. Crough-ton*, 17 Mo. 367; *Garnier v. Lebeau*, 30 Mo. 229; *Scheifer v. Kahlman*, Id. 232.

<sup>3</sup> *Looker v. Davis*, 47 Mo. 140.

<sup>4</sup> *Anderson v. Hance*, 49 Mo. 159.

a will, in proceedings to test its validity;<sup>1</sup> nor, the suit being on a series of contracts, does it disqualify a party making some of the contracts with one since dead, from testifying to other transactions occurring subsequent to his decease.<sup>2</sup>

The provision does not apply to transactions with third persons to which the deceased or insane person was a stranger.<sup>3</sup> The party is always competent to testify as to transactions with the deceased person's representative, after his decease.<sup>4</sup> The effect of the provision is that in a case where a party might testify in his own behalf, at common law, he may still do so notwithstanding the other party's death; the proposed witness stands, in regard to testifying, precisely as if the statute allowing parties to testify had not been enacted.<sup>5</sup> When the transaction with the deceased person comes in question in an action between the proposed witness and a stranger, testimony as to such transaction is competent.<sup>6</sup> And when one of two joint contractors has died, this does not disqualify the party with whom they contracted from testifying as to the contract.<sup>7</sup>

Where the proposed testimony does not directly relate to the contract in issue, the party may testify even though the other party to the contract be dead.<sup>8</sup>

§ 124. **Montana.** — "No person shall be disqualified as a witness in any action or proceeding on account of his opinion on matters of religious belief, or by reason of his interest in the event of the action or proceeding, as a party thereto or otherwise; but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either *viva voce* or by deposition, or upon a commission, in the same manner and subject to the same rules of examination as any other wit-

<sup>1</sup> Garvin v. Williams, 50 Mo. 201.

<sup>2</sup> Poe v. Domic, 54 Mo. 119.

<sup>3</sup> Martin v. Jones, 59 Mo. 181.

<sup>4</sup> McGlothlin v. Henry, 59 Mo. 213;  
Wade v. Hardy, 75 Mo. 394.

<sup>5</sup> Angell v. Hester, 64 Mo. 142.

<sup>6</sup> Bradley v. West, 68 Mo. 69.

<sup>7</sup> Faulkerson v. Thornton, 68 Mo. 468; Nugent v. Curran, 77 Mo. 323.

<sup>8</sup> Ring v. Jamison, 2 Mo. App. 584.

For further application of the above principles in actions on *bills* and *notes*, see Amonett v. Montague, 63 Mo. 201;

State v. Huff, Id. 288; Angell v. Hester, 64 Mo. 142; Hisaw v. Sigler, 68 Mo. 449; Smith v. Witton, 69 Mo. 458; Lewis v. Weissham, 1 Mo. App. 222; Million v. Ohnsorg, 10 Id. 432. In actions respecting *real property*, see Johnson v. Quarles, 46 Mo. 423; Martin v. Jones, 72 Mo. 23; Hughes v. Israel, 73 Mo. 538. To what extent the *widow* of the deceased person is competent, see Scroggin v. Holland, 16 Mo. 419; Hanley v. Life Assoc. of America, 4 Mo. App. 253.

ness, on behalf of himself or either or any of the parties to the action or proceeding.”<sup>1</sup> The exceptions are substantially the same as some of those formerly examined,<sup>2</sup> and that with respect to testimony as to transactions with deceased persons has been construed to leave the rule of competency as it was at common law.<sup>3</sup>

§ 125. **Nebraska.** — “Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: *first*, persons of unsound mind at the time of their production; *second*, Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them intelligently and truly; *third*, husband and wife concerning any communication made by one to the other during marriage, whether called as a witness while that relation subsists or afterward; *fourth*, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client’s consent in open court or in writings produced in court; *fifth*, a clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.”<sup>4</sup>

“No person having a direct legal interest in the result of any civil cause or proceeding shall be a competent witness therein, when the adverse party is an executor, administrator, or legal representative of a deceased person, unless the testimony of such deceased person shall have been taken during his lifetime, and is to be read in evidence in such cause or proceeding.”<sup>5</sup>

The word “representative” in section 329, is held to include any person or party who has succeeded to the rights of the deceased, whether by purchase, descent, or operation of law.<sup>6</sup> A liability for costs creates a sufficient interest to exclude the witness;<sup>7</sup> and a person precluded by the statute

<sup>1</sup> Laws 1872, § 444.

<sup>2</sup> *Supra*, § 103, p. 159.

<sup>3</sup> *Shober v. Jack*, 3 Mont. 351.

<sup>4</sup> Comp. L. 1883, p. 574, § 328.

<sup>5</sup> *Ibid.* p. 575, § 329.

<sup>6</sup> *Wamsley v. Crook*, 3 Neb. 344.

<sup>7</sup> *Ransom v. Schmela*, 13 Neb. 73; s. c., 12 N. W. Rep. 926.

from testifying against the representative cannot, by transferring his interest during the pendency of the action, remove the disqualification.<sup>1</sup>

§ 126. **Nevada.** — “No person shall be disqualified as a witness in any action or proceeding, on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding, as a party thereto or otherwise; but the party or parties thereto, and the person on whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and be compellable to give evidence, either *viva voce* or by deposition, or upon a commission, in the same manner, and subject to the same rules of examination as other witnesses, on behalf of himself or either or any of the parties to the action or proceeding.”<sup>2</sup>

§ 127. **New Hampshire.** — “No person who believes in the existence of a supreme being shall be excluded from testifying on account of his opinions on matters of religion.”<sup>3</sup>

“No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein, as a party or otherwise.”<sup>4</sup>

“Neither party shall testify in a cause when the adverse party is an executor, or administrator, or an insane person, unless the said executor, administrator, or the guardian of the insane party elects to testify, except as provided in the following section.”<sup>5</sup>

“When it clearly appears to the court that injustice may be done without the testimony of the party in such case, he may be allowed to testify, and the ruling of the court, admitting or rejecting his testimony, may be excepted to and revised.”<sup>6</sup>

“A husband and wife are competent witnesses for or against each other, whether joined as parties or not, in all cases both civil and criminal.”<sup>7</sup>

<sup>1</sup> *Magemau v. Bell*, 13 Neb. 247; *Gloster*, 13 Id. 279; *Vesey v. Benton*, s. c., 13 N. W. Rep. 277. Id. 284; *Higgs v. Hanson*, Id. 356.

<sup>2</sup> Comp. L. Vol. I. p. 405, § 1438. <sup>3</sup> Gen. Laws 1878, ch. 228, § 12; *Frie v. Buckingham*, 59 N. H. 219.

The exceptions are the same as those of Arizona, *supra*, § 101, p. 156. For decisions construing them, see *Rice v. Martin*, 7 Sawy. (U. S.) 337; *Roney v. Ruckland*, 4 Nev. 45; *Hastings v.*

<sup>4</sup> *Ibid.* § 13.

<sup>5</sup> *Ibid.* § 16.

<sup>6</sup> *Ibid.* § 17.

<sup>7</sup> *Ibid.* § 20.



"No person shall be incompetent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credit as a witness."<sup>1</sup>

Prior to the enactment of section 16, *supra*, a party was held competent to testify notwithstanding the insanity of the adverse party, the latter appearing by guardian;<sup>2</sup> and even an executor could be compelled to testify by the adverse party, but in such a case such adverse party was not made thereby a competent witness.<sup>3</sup> Where the executor, being a party, elects to testify in the cause, the court has no discretionary power to reject the proffered testimony of the adverse party, even though it relate to conversations between himself and the testator, of which the executor had no knowledge, and which he could have no means of contradicting or explaining.<sup>4</sup> But on the other hand, the party will not be allowed to testify to matters which he claims were not within the knowledge of the testator, without other proof that injustice will otherwise be done.<sup>5</sup> The safe guide and decisive test in determining whether to allow the party to give evidence, is found in the inquiry whether the deceased, if alive, could testify to the same matters.<sup>6</sup> In no event can the representative testify to facts within the knowledge of the deceased, in the prosecution of his own personal claim against the estate he represents.<sup>7</sup>

The exclusion does not apply where the party would be competent without the aid of the enabling statute;<sup>8</sup> nor to keep out testimony as to transactions and admissions arising since the decease of the testator or intestate;<sup>9</sup> nor where both parties are representatives of deceased persons.<sup>10</sup> In one case

<sup>1</sup> *Ibid.* § 27. For decisions as to the competency of *parties*, generally under earlier, and now obsolete statutes, see *Stevens v. Hall*, 6 N. H. 508; *State v. McGlynn*, 34 Id. 422; *Smith v. Balch*, 40 Id. 363. As to competency of *corporate officers*, see *Dearborn v. Boston &c. R. R. Co.*, 24 N. H. 179. Of *defaulted defendant*, see *Bean v. Walker*, 38 N. H. 359. As to *examining adverse party* on jury trials, and *interrogatories* in chancery cases, see *Lovejoy v. Jones*, 30 N. H. 164; *Patten v. Moore*, 33 Id. 523.

<sup>2</sup> *Crawford v. Robie*, 42 N. H. 162. See also *Taylor v. Grand Trunk R. Co.*, 48 Id. 304.

<sup>3</sup> *Harvey v. Hilliard*, 47 N. H. 551.

<sup>4</sup> *Ballou v. Tilton*, 52 N. H. 605.

<sup>5</sup> *Fosgate v. Thompson*, 54 N. H. 455.

<sup>6</sup> *Hoit v. Russell*, 56 N. H. 559.

<sup>7</sup> *Perkins v. Perkins*, 58 N. H. 405.

<sup>8</sup> *Page v. Whidden*, 59 N. H. 507; *Pierce v. Burroughs*, Id. 512; *Snell v. Parsons*, Id. 521.

<sup>9</sup> *Brown v. Brown*, 48 N. H. 90.

<sup>10</sup> *Stearns v. Wright*, 51 N. H. 600.

it is held that, the plaintiff being an executor, letters written by the defendant as agent of the testator, and at his request, were competent evidence as admissions made by the testator, although the defendant himself could not testify.<sup>1</sup>

§ 128. **New Jersey.** — “That no person offered as a witness in any action or proceeding of a civil or criminal nature, shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on the cross-examination of the witness, or by the production of the record thereof, for the purpose of affecting his credit.”<sup>2</sup>

“In all civil actions in any court of record in this State, the parties thereto shall be admitted to be sworn and give evidence therein, when called as witnesses by the adverse party in such action; and when any party is called as a witness by the opposite party, he shall be subject to the same rules as to examination and cross-examination as other witnesses: *provided*, that no party to a suit shall be compelled to be sworn or give evidence in any action brought to recover a penalty or to enforce a forfeiture; *and provided, also*, that this section shall not apply to suits for divorce.”<sup>3</sup>

“No person shall be disqualified as a witness in any suit or proceeding, at law or in equity, by reason of his or her interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; *provided, nevertheless*, that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in a cause sue or be sued in a representative capacity, except as hereinafter provided.”<sup>4</sup>

“A party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf, and admitted, the opposite party may in like manner be admitted as a witness.”<sup>5</sup>

“In any trial or inquiry in any suit, action, or proceeding in any court, or before any person having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise, shall be competent and compellable to

<sup>1</sup> *Harriman v. Jones*, 58 N. H. 328.

<sup>2</sup> Rev. 1877, p. 378, § 1.

<sup>3</sup> *Ibid.* § 2.

<sup>4</sup> *Ibid.* § 3.

<sup>5</sup> *Ibid.* § 4.

give evidence the same as other witnesses, on behalf of any party to such suit, action, or proceeding: *provided*, that nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding for divorce on account of adultery, except to prove the fact of marriage, or in any action for criminal conversation; nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage.”<sup>1</sup>

Section 4, *supra*, applies to actions pending at the time of its passage,<sup>2</sup> but under that section the adverse party will not be permitted to be sworn, except where the personal representative has first been sworn and testified.<sup>3</sup> The provision applies where one of the parties dies pending the prosecution of the action,<sup>4</sup> and the representative cannot testify for himself on the trial of exceptions to his account with the estate.<sup>5</sup>

On the other hand, in replevin, where the defendant pleads *non cepit*, and property in himself as administrator, the defendant is not sued in a representative capacity, and the plaintiff is a free witness in the case.<sup>6</sup> So, where a defendant who has no interest in the event is made a party, he may testify, though the complainant sues in a representative capacity.<sup>7</sup> The adverse party may call the representative party as a witness, but this will not render such adverse party competent.<sup>8</sup> A surviving partner, when sued by an executor, is a competent witness on questions not involving

<sup>1</sup> *Ibid.* § 5; *Parker v. Thompson*, 1 Vr. 311. As to the competency of parties, generally, under earlier statutes, see *Handlong v. Barnes*, 1 Vr. 69; *Leonard v. Sutphen*, 3 Halst. Eq. 345; *Lanning v. Lanning*, 2 C. E. Gr. 228. For the practice on examining adverse parties, issuing interrogatories, etc., see *Van Valkenberg v. Rahway Bank*, 3 Zab. 583; *Myers v. Hollingsworth*, 2 Dutch. 186; *Voorhees v. Jones*, 5 Id. 270. As to discovery of books and papers, see *Condict v. Wood*, 1 Dutch. 319. When an order of the court is necessary to examine a party, see *Hewitt v. Crane*, 2 Halst. Eq. 159;

*Giveans v. McMurtry*, 1 C. E. Gr. 468.

<sup>2</sup> *Benson v. Cox*, 8 Stew. 87.

<sup>3</sup> *Shepherd v. McClain*, 3 C. E. Gr. 128; *Walker v. Hill*, 6 Id. 191. See also *Montgomery v. Simpson*, 4 Stew. 1.

<sup>4</sup> *Halstead v. Tyng*, 2 Stew. 86.

<sup>5</sup> *Smith v. Burnet*, 7 Stew. 219; s. c., 8 Id. 314.

<sup>6</sup> *Hodge v. Coriell*, 15 Vr. 456, *Parker, J.*, dissenting. See also *Holmes v. Chester*, 12 C. E. Gr. 423.

<sup>7</sup> *Harrison v. Johnson*, 3 C. E. Gr. 420.

<sup>8</sup> *Daw v. Vreeland*, 3 Stew. 542.

any personal intercourse between the witness and the deceased.<sup>1</sup> And in proceedings on a caveat, to establish a will, the proponent (a beneficiary) may be a witness.<sup>2</sup>

§ 129. **New Mexico.** — In this Territory the provisions of the United States Revised Statutes<sup>3</sup> furnish the rules as to the competency of witnesses, until the territorial legislature pass a statute upon the subject, and the only decision found by the writer is to the effect that a former administrator *de bonis non* is a competent witness for one subsequently appointed, in a suit relating to the estate, where such witness is not shown to be interested in the event of the suit.<sup>4</sup>

§ 130. **New York.** — (1) *Early provisions and decisions.* Shortly after the passage of the Code of Procedure, by which important changes were made in the common-law rules as to the competency of witnesses, it was held that statutes making competent parties to the record merely remove the former objection founded on the relation of the witness to the suit. Witnesses incompetent from another cause — *e.g.*, a wife, an insane person — are not rendered competent by the fact of being joined as parties.<sup>5</sup> It was also held that the removal of the disqualification of interest in the event, rendered an agent competent as a witness against his principal, though the effect of his evidence should be to discharge himself and charge his principal.<sup>6</sup> So, also, a surety in an undertaking given to obtain a provisional remedy was held not incompetent, he not being a person for whose benefit the action was prosecuted or defended.<sup>7</sup>

In chancery practice, a party could be examined on obtaining an order for that purpose;<sup>8</sup> and in actions of a legal character, on giving notice to the opposite party of his intention so to do, a party could be a witness in his own behalf.<sup>9</sup> So, also, a co-defendant was competent for those joined with him;<sup>10</sup> or, if defaulted, for the plaintiff, and against the other

<sup>1</sup> *Besson v. Cox*, 8 Stew. 87.

<sup>2</sup> *Mackin v. Mackin*, 10 Stew. 528.

<sup>3</sup> *Supra*, § 98.

<sup>4</sup> *Beall v. Territory*, 1 New Mex. 507.

<sup>5</sup> *Pillow v. Bushnell*, 4 How. Pr. 9.  
*S. P. Symonds v. Peck*, 10 How. Pr. 395;  
*Rich v. Husson*, 4 Sandf. 115.

<sup>6</sup> *Fenly v. Stewart*, 5 Sandf. 101.

<sup>7</sup> *Jessop v. Miller*, 2 Abb. App. Dec. 449.

<sup>8</sup> Anonymous, 1 Barb. Ch. 408;  
*Hitchcock v. Skinner*, Hoffm. 21;  
*Ormsby v. Wood*, Hopk. 229.

<sup>9</sup> *Hinds v. Barton*, 25 N. Y. 544;  
*Bissell v. Hamlin*, 3 Bosw. 383.

<sup>10</sup> *Parsons v. Pierce*, 8 Barb. 655;  
*City of New York v. Price*, 4 Sandf.

defendants;<sup>1</sup> and the plaintiff could be called by the defendant, and in case he testified to new matter beyond the point to which he was called, the defendant could testify in answer to such new matter.<sup>2</sup>

It is profitless, however, at this time, to examine decisions which interpreted sections of the Code of Procedure, which have not been embodied in the Code of Civil Procedure, or which have been expressly repealed.<sup>3</sup> The only sections of the former code relating to our subject proper, which are still substantially the law, are §§ 396, 398, and 399, the first two embodied in § 828, and the third in § 829 of the Code of Civil Procedure. These we will now consider.

(2) *Parties and persons interested made competent.* Section 396 of the Code of Procedure rendered competent persons for whose immediate benefit an action was prosecuted or defended, whether such person was a party or not; and section 398 removed altogether the disqualification of interest in the event. Parties had been rendered competent by other provisions. Both of these sections are now replaced by section 828 of the Code of Civil Procedure, which reads as follows: "Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding, or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended."

Under this provision it has been decided that in a proceeding to prove a will, the executor named in it may testify;<sup>4</sup>

616; *Kilmer v. O'Hara*, 1 Bosw. 601; *Selkirk v. Waters*, 5 How. Pr. 296; *Mechanics' &c. Bank v. Rider*, Id. 401.

<sup>1</sup> *Thompson v. Blanchard*, 4 N. Y. 303; *Bank of Charleston v. Emeric*, 2 Sandf. 718.

<sup>2</sup> *Myers v. McCarthy*, 2 Sandf. 399. See also *Richardson v. Wilkins*, 19 Barb. 510. For applications of these rulings in action upon *bills and notes*, see *Evarts v. Palmer*, 7 Barb. 178; *Ladue v. Van Vechten*, 8 Id. 664; *Mechanics' &c. Bank v. Rider*, 1 Code N. S. 61. Actions against *carriers*,

see *Davis v. Cayuga &c. R. R. Co.*, 10 How. Pr. 330. Against *corporations*, see *Field v. New York &c. R. R. Co.*, 29 Barb. 176; *Johnson v. McIntosh*, 31 Id. 267; *La Farge v. Exchange &c. Ins. Co.*, 3 Bosw. 157; 22 N. Y. 352; *Mott v. New York*, 2 Hilt. 358; *Wallace v. New York*, Id. 440; *Wright v. New York &c. R. R. Co.*, 28 Barb. 80; *Goodyear v. Phoenix &c. Co.*, 48 Id. 522. In proceedings under the *mechanics' lien law*, see *Canon v. Van Wagner*, 2 E. D. Smith, 590.

<sup>3</sup> *Laws 1877*, ch. 417, § 1.

<sup>4</sup> *Childrens' Aid Soc. v. Loveridge*, 70 N. Y. 387.

in a suit by an executor to recover a debt due the estate, a residuary legatee is competent;<sup>1</sup> but that where a sheriff sues for damages for wrongfully taking goods subject to a levy, the execution plaintiff is not a competent witness for the defendant.<sup>2</sup> The testimony of the plaintiff alone, uncorroborated, and contradicted by two witnesses, is enough to sustain a finding of fact,<sup>3</sup> and it is error to refuse to submit the cause, in such case, to the jury.<sup>4</sup> But the tribunal trying the question of fact, whether it be the court, a referee, or a jury, is not bound to take the testimony of an interested witness as conclusive, even though it be uncontradicted: such weight is to be given it as that tribunal shall see fit.<sup>5</sup> But a party who calls his adversary as a witness is bound by his testimony, both on the direct and cross examination, to the same extent as he would be by the testimony of any other witness called by him.<sup>6</sup>

(3) *When party or person interested cannot be examined generally.* "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section, by reason of being a stock-

<sup>1</sup> Freeman v. Spalding, 12 N. Y. N. C. 356. S. P. Moody v. Pell, 2 Id. 373.

<sup>2</sup> Howland v. Willetts, 9 N. Y. 170.

<sup>3</sup> Miller v. Ins. Co. of North America, 1 Abb. N. C. 470; Stillwell v. Carpenter, 2 Id. 238.

<sup>4</sup> Hodge v. City of Buffalo, 1 Abb.

274.

<sup>5</sup> McNulty v. Heard, 86 N. Y. 547;

Nicholson v. Connor, 8 Daly, 212; Schintzer v. Adelson, Id. 269.

<sup>6</sup> Branch v. Levy, 11 Week. Dig.

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holder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.”<sup>1</sup>

In construing these two sections, the courts have held that the admissibility, in the cases mentioned, of testimony as to transactions with, or declarations of, a deceased person, does not depend upon the fact that at the time when it is offered, there is some person living who can contradict it. On the contrary, its admissibility depends on the nature of the transaction to which it relates.<sup>2</sup> Where such testimony tends to show that a transaction to which the deceased was a party was usurious, it is incompetent.<sup>3</sup> And testimony that an alleged transaction or conversation between the witness and the deceased never took place, is as inadmissible as testimony explanatory of the transaction or conversation.<sup>4</sup>

On the other hand, one who sued a bank for a sum of money that the bank had placed to her credit on her presenting what purported to be an order of a depositor, since deceased, was allowed to testify to any material fact, although consisting of personal transactions between herself and the deceased.<sup>5</sup> So, also, where a widow made a verbal agreement with a farm hand, that he should work the farm upon the same terms on which he had worked it under a verbal agreement with her deceased husband, in an action by the widow to enforce the first mentioned agreement, the defendant was permitted to show the particular terms of his agreement with

<sup>1</sup> Code Civ. Pro. § 829. The last sentence was added by amendment, by Laws 1881, ch. 703. This section, barring unimportant changes in phraseology, is substantially the same as § 399 of the former code; except that the introductory words, “Upon the trial of an action or the hearing upon the merits of a special proceeding” were added, in order to prevent its application to motions and other interlocutory proceedings; and that the words, “in his own behalf or interest, or in behalf of the party succeeding to his title or interest” were added, in order to prevent the section being construed to incapacitate the witness as well where he testified *against*, as where he tried to *further* his own in-

terest; such construction having been given to § 399. See *Richardson v. Warner*, 13 Hun, 13; *Gifford v. Sackett*, 15 Id. 79; *Alexander v. Dutcher*, 70 N. Y. 385. Keeping in mind these two changes, cases decided while § 399 was in force are equally applicable to this section, and will be cited as freely as though decided after the enactment of § 829.

<sup>2</sup> *Hatch v. Peugnet*, 64 Barb. 189.

<sup>3</sup> *Smith v. Cross*, 90 N. Y. 549.

<sup>4</sup> *Haughey v. Wright*, 12 Hun, 179; *Clark v. Smith*, 46 Barb. 30; *S. P. Maverick v. Marvel*, 90 N. Y. 656. See *Wilkins v. Baker*, 24 Hun, 32; *Mosner v. Raulain*, 66 Barb. 213. But see *infra*, *subd.* (9) of this section.

<sup>5</sup> *Severn v. State Bank*, 18 Hun, 228.

the deceased.<sup>1</sup> In such cases as these the evidence is admitted from necessity, and to prevent a failure of justice; besides, it will be seen, the action is not by or against the representatives of the deceased.

Again, in an action against the survivor of two joint makers of a note, the plaintiff may testify as to personal transactions with the deceased maker.<sup>2</sup> Even in actions against the representatives of a decedent, the plaintiff may testify as to the contents of an entry in the account-book of the deceased, in his handwriting, which he swears he saw and read during the lifetime of the deceased, the loss of the account-book being first proved.<sup>3</sup> So, also, a physician's books are admissible to show services to a deceased, though relating to a personal transaction, where the rendering of part of the services, and the fact that the physician kept correct accounts, are proved by other witnesses.<sup>4</sup> Even where the plaintiff is improperly permitted to testify, in his own behalf, as to a personal transaction with deceased, the error is cured, if the defendant afterwards puts in evidence the deposition of the deceased taken before the trial.<sup>5</sup>

(4) *Who is deemed the personal representative of a deceased person.* Only the executors or administrators of the deceased are deemed to be his representatives;<sup>6</sup> *heirs* are not his representatives.<sup>7</sup> Nor is a foreign executor or administrator, as he cannot sue here in his representative capacity.<sup>8</sup>

(5) *What is a "personal transaction or communication."* "Transactions" and "communications," as used in the statute, include every method by which one person can derive any impression or information from the conduct, condition, or language of another.<sup>9</sup> The placing of money or property in the hands of the deceased is a personal transaction with him, "and the intent with which it was done accompanied and characterized the transaction, and was an element thereof."<sup>10</sup>

<sup>1</sup> Titus v. O'Connor, 18 Hun, 373.

<sup>2</sup> Sprague v. Swift, 28 Hun, 49. See *infra*, *subd.* (12) of this section.

<sup>3</sup> Carroll v. Davis, 9 Abb. N. C. 60.

<sup>4</sup> Wetmore v. Peck, 19 Alb. L. J. 400.

<sup>5</sup> Trow v. Shannon, 8 Daly, 239; *affirmed*, 78 N. Y. 440, not noticing this point, however. See as to this *infra*, *subd.* (16) of this section.

<sup>6</sup> 12 Abb. Pr. 1.

<sup>7</sup> Spaulding v. Hallenbeck, 39 Barb. 79; 35 N. Y. 204; Traphagen v. Traphagen, 40 Barb. 537; Sanford v. Sanford, 5 Lans. 486; 61 Barb. 293.

<sup>8</sup> Buckingham v. Andrews, 34 Barb. 434.

<sup>9</sup> Holcomb v. Holcomb, 95 N. Y., 316.

<sup>10</sup> Tooley v. Bacon, 70 N. Y. 34. Compare Hill v. Heermans, 17 Hun, 470.



So is the parting, by the holder, with the possession of the note to the maker, who afterwards dies.<sup>1</sup> Or the supplying of goods, and rendition of services to the deceased,<sup>2</sup> as by an attorney, for instance.<sup>3</sup> Or the making of notes by the deceased to the order of, and indorsed by, the witness.<sup>4</sup> Turning towards the deceased person and addressing remarks to him constitute a "personal communication" with him.<sup>5</sup> And the writer of letters to the deceased cannot testify, in an action founded on such letters, by the administrator, against him, that such letters were written, or that they were received and retained without objection or reply. Such testimony relates both to a "transaction" and a "communication" between the witness and the deceased.<sup>6</sup>

On the other hand, the acts of executing and publishing the will, and request by the testator to a person present to subscribe as a witness, do not constitute a "communication or transaction" between the witness and the testator.<sup>7</sup>

(6) *Who is an "assignor."* One who indorses a negotiable note<sup>8</sup> or check,<sup>9</sup> or who transfers the same by delivery, without indorsement,<sup>10</sup> or even by a separate writing,<sup>11</sup> is not regarded as an assignor of a thing in action in such a sense that he may be a witness in his own behalf,<sup>12</sup> or so that after he has testified for the plaintiff, the defendant may testify as to the same matter.<sup>13</sup> But in the case of a non-negotiable note,<sup>14</sup> such as a property note,<sup>15</sup> or a personal chattel, or thing in action,<sup>16</sup> the transferor was held an "assignor" within the provision. But the cases are not in harmony: thus the vendor of personal property was held not to be an "assignor,"<sup>17</sup> even after the conversion of the property sold;<sup>18</sup> and the same was

<sup>1</sup> Van Gelder v. Van Gelder, 81 N. Y. 625. See also *Waver v. Waver*, 15 Hun, 277.

<sup>2</sup> Fisher v. Verplanck, 17 Hun, 150.

<sup>3</sup> Freeman v. Lawrence, 43 Superior, 288. S. P. *Somerville v. Crook*, 9 Hun, 664.

<sup>4</sup> Strong v. Dean, 55 Barb. 337.

<sup>5</sup> Bague v. Lord, 67 N. Y. 495.

<sup>6</sup> Resseguie v. Mason, 58 Barb. 99.

<sup>7</sup> Reeve v. Crosby, 3 Redf. 74. See also *Smith v. Sergeant*, 4 Thomp. & C. 684; *Hill v. Heermans*, 22 Hun, 455.

<sup>8</sup> Hicks v. Worth, 4 E. D. Smith, 78; *Porter v. Potter*, 18 N. Y. 52.

<sup>9</sup> *Anderson v. Busteed*, 5 Duer, 485.

<sup>10</sup> *Watson v. Bailey*, 2 Duer, 509; *Gardner v. Gordon*, 3 Bosw. 369.

<sup>11</sup> *Porter v. Potter*, *supra*.

<sup>12</sup> § 399.

<sup>13</sup> But see *Collins v. Knapp*, 18 Barb. 532.

<sup>14</sup> *Jagoe v. Alleyn*, 16 Barb. 480.

<sup>15</sup> 1 Bosw. 402.

<sup>16</sup> 17 Barb. 538.

<sup>17</sup> *McGinn v. Worden*, 3 E. D. Smith, 355.

<sup>18</sup> *Ibid.*; *Hall v. Robinson*, 2 N. Y. 293.

held of a surviving partner,<sup>1</sup> and of a legatee.<sup>2</sup> So it has been decided that a conveyance of land is not an assignment of a thing in action or contract, even when made to enable the grantor to become a witness in the suit.<sup>3</sup>

(7) *Who is an "assignee."* A plaintiff claiming personal property under a contract of hiring made with a deceased person is not an "assignee" within the meaning of section 399.<sup>4</sup> Nor is the indorsee of a note.<sup>5</sup> A party is not to be excluded as an assignee, unless he derived his title *immediately* from the deceased in his lifetime. If he derived it mediately or remotely from the deceased, he is, competent.<sup>6</sup> Thus, the assignee of a devisee is not incompetent to testify as to personal transactions between himself and the divisor.<sup>7</sup>

(8) *Competency of assignor.* In construing section 399 the courts held that one who had assigned a claim to his creditor for a nominal consideration, remaining liable for the whole debt, was a competent witness in an action by the assignee to recover the demand;<sup>8</sup> that an assignor for the benefit of creditors was competent in an action by the assignee;<sup>9</sup> and that an express covenant in the assignment, that the claim assigned was due and payable, did not render the assignor incompetent.<sup>10</sup> But if the assignor of a thing in action remained interested in the event of the suit, he was incompetent;<sup>11</sup> and so was he if the assignment was merely colorable;<sup>12</sup> but where the transfer was actually made, he was competent, even though the object of the assignment was to enable him to become a witness.<sup>13</sup> Thus the assignor of a judgment was held competent to testify in a suit on the judgment against a legatee.<sup>14</sup>

<sup>1</sup> Tremper v. Conklin, 44 Barb. 456.  
And see *infra*, p. 219, n. 5.

<sup>2</sup> Wildey v. Whitney, 25 How. Pr. 75.

<sup>3</sup> Beach v. Cooke, 28 N. Y. 508.

<sup>4</sup> Penny v. Black, 6 Bosw. 50.

<sup>5</sup> Collier v. Wenner, 45 Barb. 397.  
See also Comstock v. Hier, 73 N. Y. 269.

<sup>6</sup> Prouty v. Eaton, 41 Barb. 409;  
Collier v. Wenner, *supra*.

<sup>7</sup> Theall v. Steitz, 6 Daly, 482.

<sup>8</sup> Bridges v. Hyatt, 16 N. Y. 546.

<sup>9</sup> Jones v. M. E. Church, 21 Barb. 161.

<sup>10</sup> Winthrop v. Meyer, 4 E. D. Smith, 177.

<sup>11</sup> 3 How. Pr. 401.

<sup>12</sup> 4 E. D. Smith, 59.

<sup>13</sup> Vasseur v. Livingstone, 4 Duer, 285.

<sup>14</sup> Hight v. Sackett, 34 N. Y. 447;  
but the case turned on the point that the legatee was not "an assignee, or executor, or administrator," within the meaning of § 399. See also Richardson v. Warner, 13 Hun, 13; Boches v. Lansing, Id. 38.

As to the necessity and sufficiency of the notice to be given to the adverse party, of intention to examine the "assignor of a thing in action or contract," under § 399, see Jagoe v. Allen,

(9) *Showing extraneous facts and circumstances.* Section 829 prohibits the survivor from testifying that any particular communication or transaction did or did not take place between him and the deceased, but there the prohibition ends. It does not preclude him from testifying to extraneous facts or circumstances, which tend to show that a witness who has testified to such a transaction or communication, has testified falsely, or that it is impossible that his statement can be true, as, for instance, that the survivor was absent from the country when the transaction is stated by the witness to have occurred. So long as the survivor refrains from testifying as to anything that passed or did not pass, personally, between himself and the deceased, it is not a valid objection to his testimony, that the facts which he states bear upon the issue, whether or not the personal transaction in question took place, or upon the truth of the testimony by which such transaction is sought to be proved against him. Therefore, where a witness had testified in behalf of an administrator plaintiff, to a transaction between the defendant and the intestate in his presence, it was held that the defendant might testify that the witness was not present at any transaction between him and the intestate; and that the interview between them did not take place in the room where the witness testified it did, but in another room.<sup>1</sup>

(10) *Conversations between the deceased and third person,*

16 Barb. 580; *Seymour v. Bradfield*, 35 Id. 49; *Falon v. Keese*, 8 How. Pr. 341; *Benham v. N. Y. & C. R. R. Co.*, 13 Id. 198; *Pattison v. Johnson*, 15 Id. 289.

<sup>1</sup> *Pinney v. Orth*, 88 N. Y. 447. This is an action by H. to recover some negotiable bonds which he claimed to have deposited with the deceased for safe keeping merely, but which were found in deceased's safe with his name inserted in the blanks, and claimed by the defendant as assignee of the deceased, H. was asked whether deceased's name was on the bonds when he, H., put them in his safe. This question was objected to as involving a personal transaction with the deceased, but the Court of Appeals affirmed the decision of the trial

court, overruling the objection, on the ground that the question involved no personal transaction, but merely respected the condition of the bonds at a particular time. *Wadsworth v. Heermans*, 85 N. Y. 639; *affirming s. c., sub nom. Hill v. Heermans*, 22 Hun, 455. But see, to the contrary, *Pease v. Barnett*, 30 Hun, 525. So, also, in another case, — an action for money had and received, — the plaintiff was allowed to testify as to the amount of money deposited by him to the credit of the deceased, and entered in his bank-book. *Franklin v. Pinckney*, 18 Abb. Pr. 186. See also *Gorham v. Price*, 25 Hun, 11; and *Dyer v. Dyer*, 48 Barb. 190, which last cited case held the other way, under § 399.

*overheard by witness.* The provisions we are considering do not prevent a party testifying, in an action in which the legal representatives of a deceased person are adverse parties, to a conversation between the deceased and a third person, overheard by the witness; such hearing is not "a transaction had personally between the deceased and the party."<sup>1</sup> Thus, in an action by the administrator, to set aside a deed made by the intestate, the next of kin may testify to the sayings and doings of the intestate, which were without any inducement or participation on the part of the witness.<sup>2</sup> But if the conversation overheard was connected with anything that passed between the witness and the deceased;<sup>3</sup> or if he took any part in it, and it related to a transaction between himself and the deceased, he is incompetent.<sup>4</sup> It will not suffice, in such a case, to offer to leave out his share in the conversation and testify only to the balance.<sup>5</sup> So, also, if the third person present was the agent of the witness, and acting at the time in his interest, the witness cannot testify to what he overheard.<sup>6</sup> And a defendant cannot testify, where he would otherwise be forbidden by this provision, merely because the plaintiff, the executor of the deceased, whose transactions are in question, was present at the conversation.<sup>7</sup>

(11) *Transactions with agents.* The prohibition we are examining does not extend to transactions with agents of the deceased person,<sup>8</sup> or with the deceased agent of the adverse party.<sup>9</sup> Thus, while a party may not testify to a payment made by himself to the deceased, he may testify to a payment made to his agent.<sup>10</sup> But where an agent lent money and took a note payable to his principal or bearer, and afterwards bought the note, and died, in an action on the note by his administrator, the defendant was not allowed to testify as to personal conversations with deceased at the time the note was given, so as to let in the defence of usury.<sup>11</sup>

<sup>1</sup> *Simons v. Sisson*, 26 N. Y. 264; *Hildebrandt v. Crawford*, 65 N. Y. 107; *affirming s. c.*, 6 Lans. 502; *Patterson v. Copeland*, 52 How. Pr. 460; *Marsh v. Gilbert*, 2 Redf. 465.

<sup>2</sup> *Holcomb v. Holcomb*, 20 Hun, 156.

<sup>3</sup> *Brague v. Lord*, 67 N. Y. 495; 2 Abb. N. C. 1; *reversing s. c.*, 41 Superior, 193.

<sup>4</sup> *Kraushaar v. Meyer*, 72 N. Y. 602; *Smith v. Ulman*, 26 Hun, 386.

<sup>5</sup> *Ross v. Harden*, 42 Superior, 427.

<sup>6</sup> *Head v. Teeter*, 10 Hun, 548.

<sup>7</sup> *Howell v. Taylor*, 11 Hun, 214. And see *Cornell v. Cornell*, 12 Id. 312.

<sup>8</sup> *Pratt v. Elkins*, 80 N. Y. 198.

<sup>9</sup> *Platner v. Platner*, 78 N. Y. 90.

<sup>10</sup> *Kerr v. McGuire*, 28 N. Y. 446.

<sup>11</sup> *Jackson v. McLure*, 3 Week. Dig.

(12) *Transaction with defendant who is living, co-defendant having died.* The disqualification depends entirely upon the state of facts existing at the time the testimony is given, not upon any subsequent change; therefore, the death of one of two defendants affords no ground for striking out that portion of plaintiff's testimony which was given before his death. In such a case, a transaction with the surviving defendant is not rendered inadmissible by the death of the other. Thus, in an action on a bridge contract, a diagram which had been used in the presence of both defendants, one of whom had since died, should not be excluded because plaintiff could not recollect from which one he received it.<sup>1</sup>

(13) *Witness who has no interest, or who testifies against interest.* Even at common law, a witness other than a party, who had no interest in the event, or who testified against his interest, was generally deemed competent,<sup>2</sup> but the courts so construed section 399 of the Code of Procedure, as to make the witness incompetent even when called to testify against his own interest.<sup>3</sup> This led to the insertion, in section 829 of the present code, of the words, "in his own behalf or interest, or in behalf of the party succeeding to his title or interest," and it is now well settled that the section does not apply where the witness has no interest, or being interested, testifies against his interest.<sup>4</sup> Thus a son of the deceased is not within the prohibition of the statute against an interested person testifying, if the estate of the deceased is insolvent.<sup>5</sup> And an attorney's lien upon his client's cause of action does not render him interested within this provision.<sup>6</sup> The fact that the witness is interested at the time of the trial will not disqualify him, if he had none at the time he overheard the conversation in which the deceased took part, and it was not addressed to him.<sup>7</sup>

(14) *Rights of party after executor, etc., testifies in his*

<sup>1</sup> *Comins v. Hetfield*, 80 N. Y. 261; *Brown v. Brown*, 29 Hun, 498. S. P. affirming s. c., 12 Hun, 375. See also *Purcell v. Fry*, 19 Hun, 595; 58 How. Pr. 317.

<sup>2</sup> See *supra*, §§ 47-53.

<sup>3</sup> See *Clare v. Stewart*, 8 Hun, 127; *Richardson v. Warner*, 13 Id. 13; *Gifford v. Sackett*, 15 Id. 79; *Alexander v. Dutcher*, 70 N. Y. 385. But see *Lathrop v. Hopkins*, 29 Hun, 608.

*Hobart v. Hobart*, 62 N. Y. 80. See also *Allis v. Stafford*, 14 Hun, 418; and *contra*, *Wilkins v. Baker*, 24 Hun, 32.

<sup>6</sup> *Sherman v. Scott*, 27 Hun, 331.

<sup>7</sup> *Gloss v. Welwood*, 9 Reporter,

<sup>4</sup> *Carpenter v. Soule*, 88 N. Y. 251; 587.

*own behalf.* The court of appeals, in interpreting section 399 of the former code, held that where a party had given evidence of the admissions of his opponent respecting the terms of a verbal contract between him and a deceased person, on which the action was founded, the other party could not testify as to the terms of the contract so claimed to be admitted.<sup>1</sup> The theory was that testimony of admissions that a transaction had taken place was not testimony "as to" the transaction itself. Therefore the party could do no more than deny the making of the admissions testified to. In section 829 of the present code, however, the word, "concerning" is substituted for the words "as to," and it has been decided by the supreme court at special term, that admissions as to what took place concern the transaction to which they refer; and therefore, after the representative has testified to admissions of the adverse party to the effect that a certain transaction took place between him and the deceased, such adverse party may testify, in his own behalf, as to what the transaction itself was,<sup>2</sup> in like manner as he could do, had the representative testified concerning the transaction directly.<sup>3</sup> Again, where the representative testifies to declarations of the deceased, kindred declarations of his are admissible.<sup>4</sup> But the responsive testimony must be confined to the same transaction or communication testified to by the representative.<sup>5</sup> Thus, where the executor was examined as to the language used by the defendant to the deceased, in asserting a claim for rent in arrears, etc., this was held not sufficient to authorize the defendant to testify, in his own behalf, as to the terms of his agreement with the deceased for the hiring of the property.<sup>6</sup> A county court has decided that where what the representative swore to was not necessary to make out his case, his testifying in his own behalf did not render the other party competent.<sup>7</sup> And the

<sup>1</sup> *Chadwick v. Fonner*, 69 N. Y. 404; reversing 6 Hun, 543.

<sup>2</sup> *Markell v. Benson*, 55 How. Pr. 360.

<sup>3</sup> *Sweet v. Law*, 28 Hun, 432.

<sup>4</sup> *Marsh v. Brown*, 18 Hun, 319. This was an application for a share in the estate of the applicant's deceased father. The executors claimed to deduct an alleged advancement, to

prove which they put in evidence an entry of the deceased in an account-book. It was held that the applicant could testify concerning such advancement, and explain or deny such entry.

<sup>5</sup> *Ward v. Plats*, 23 Hun, 402.

<sup>6</sup> *Hammond v. Schultz*, 45 Superior, 611.

<sup>7</sup> *Pettit v. Geesler*, 58 How. Pr. 195. It seems to the writer that if the rep-

supreme court holds, that a party cannot, by examining his adversary concerning transactions with the deceased, thereby let in his own testimony as to such transactions.<sup>1</sup>

(15) *Rights of party when called and examined by adverse party.* When a party is called as a witness by the adverse party, and examined as to a transaction or communication with the deceased, concerning which he would have been incompetent to testify in his own behalf, he is entitled, on the cross-examination, to explain his testimony, and to state the whole transaction.<sup>2</sup>

(16) *Effect of introducing former testimony of deceased.*—Where the testimony of the deceased on a former trial is introduced by the representative, the other party may give evidence in contradiction or correction of it. If the direct-examination of deceased is read, the cross-examination may be read by the other party, though it contains testimony to a distinct and material fact—a personal transaction with deceased—not covered by the direct-examination.<sup>3</sup>

Where both parties were examined before trial, each at the instance of the other, their respective examinations reduced to writing and signed, and one of them died before trial, the deposition of the survivor was admitted in evidence, in proof of personal transactions between himself and the deceased, as to which the oral testimony of the witness would not, the other party being dead, have been admissible.<sup>4</sup> But where the parties stipulated as to what the plaintiff would swear to on the trial, and agreed that either party could read such stipulation, and the plaintiff died before trial, it was held that the defendant, after reading the stipulation, could not offer himself as a witness respecting the matters contained therein.<sup>5</sup> Where the deposition of the deceased is introduced in evidence, after the adverse party has been

representative opens the door, he should not be permitted to shut it in the other party's face.

<sup>1</sup> *Corning v. Walker*, 28 Hun, 435. S. P., under § 399, see *Angel v. Solis*, 2 E. D. Smith, 240. In such a case the representative, etc., is not examined "in his own behalf."

<sup>2</sup> *Merritt v. Campbell*, 79 N. Y. 625.

<sup>3</sup> *Potts v. Mayer*, 86 N. Y. 302; s. c., 62 How. Pr. 126; 10 Abb. N. C. 63;

*reversing* 46 Superior, 182. S. P. *Robbins v. Pultzs*, 48 Superior, 510.

<sup>4</sup> *McDonald v. Woodbury*, 65 How. Pr. 226. Such a procedure is sanctioned by § 881, notwithstanding § 829. *Rice v. Motley*, 24 Hun, 143.

<sup>5</sup> *Miller v. Adkins*, 9 Hun, 9. In such a case the testimony of the deceased is not offered in behalf of the representative.

erroneously allowed to testify in his own favor, as to personal transactions with the deceased, this cures the error if the deposition relates to the same transactions.<sup>1</sup> *It seems* that the books of account of the deceased are not "the testimony of the deceased" within the provision of the statute.<sup>2</sup>

(17) *Who may testify in proceedings to prove or contest the will.* One to whom a legacy is given on condition that he render certain religious services, is, by his interest in the event, disqualified from testifying on a probate contest, as to conversations of the testator with him. And such testimony may, on motion at the hearing, be stricken out, though not objected to when offered.<sup>3</sup> Where the probate is contested for incapacity of the testator, the executors are fully under the protection of section 829, though they are not yet technically "executors."<sup>4</sup> But the executor propounding the will may testify not only in regard to its execution, but also as to other transactions and communications with the deceased.<sup>5</sup> And the possible right of dower of a female witness, in the event of her surviving her husband, does not disqualify her from testifying, in a proceeding for the probate of her husband's father's will, to transactions had with her husband's father, although if the will should be disallowed, her husband would inherit.<sup>6</sup> But where the wife of the testator, whose powers of speech were affected by paralysis at the time of making his will, acted as interpreter between him and the person drawing the will, the proceedings were reversed because she was permitted to testify, on the probate, as to what were the testator's wishes, intentions, and directions, expressed through her, the fact being that she was legatee, devisee, and sole executrix.<sup>7</sup>

(18) *Who may testify on accounting by representative.* It has been held that in proceedings before a surrogate upon the final accounting of an administrator, a party to the record is not a competent witness;<sup>8</sup> that on an accounting

<sup>1</sup> *Trow v. Shannon*, 8 Daly, 239.

<sup>2</sup> *Benjamin v. Dinmick*, 4 Redf. 7.  
But compare *Marsh v. Brown*, 18 Hun, 319.

<sup>3</sup> *Re Burke*, 5 Redf. 369.

<sup>4</sup> *Schoonmaker v. Wolford*, 20 Hun, 166.

<sup>5</sup> *Whelpley v. Loder*, 1 Demarest, 333. But see *Re Smith*, 95 N. Y. 516.

<sup>6</sup> *Scherrer v. Kaufman*, 1 Demarest, 39. *Contra*, *Steele v. Ward*, 30 Hun, 555.

<sup>7</sup> *Lane v. Lane*, 95 N. Y. 316; s. c., 10 Week. Dig. 6.

<sup>8</sup> *Terry v. Dayton*, 31 Barb. 519.



by a non-resident executor, the surety on his bond cannot testify against the legatees, as to personal transactions with the deceased, even though they call him as their witness as to other matters;<sup>1</sup> and that the manager of a deceased person's estate cannot testify to payments made by him to the deceased, or prove them by his books, in reduction of a claim against him in favor of the estate.<sup>2</sup>

(19) *Actions by or against the representative in his individual character.* Where the representative sues in his individual capacity, and not in his representative character, the other party is not prohibited from testifying to personal transactions and communications with the deceased,<sup>3</sup> and a foreign executor cannot sue in his representative capacity.<sup>4</sup> So, also, where the representative is not sued as such, but to enforce against him, individually, a claim growing out of matters in which he acted for the estate, the plaintiff may testify as to personal transactions with the deceased.<sup>5</sup>

<sup>1</sup> *Miller v. Montgomery*, 78 N. Y. 282.

<sup>2</sup> *Elmore v. Jacques*, 4 *Thomp. & C.* 679.

<sup>3</sup> *Titus v. O'Connor*, 57 *How. Pr.* 391.

<sup>4</sup> *Buckingham v. Andrews*, 34 *Barb.* 434.

<sup>5</sup> *Hall v. Richardson*, 22 *Hun.* 444.

For further adjudications applying the foregoing principles in actions on *bills, notes, and checks*, see *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *Alexander v. Dutcher*, 70 N. Y. 385; *Church v. Howard*, 79 N. Y. 415; *reversing* 17 *Hun.* 5; *Raubitshek v. Blank*, 80 N. Y. 478; *affirming* 44 *Superior*, 564; *Nearpass v. Gilman*, 16 *Hun.* 121; *Ely v. Clute*, 19 *Id.* 35; *Hill v. Alvord*, *Id.* 77; *Hill v. Hotchkiss*, 23 *Id.* 414; *Converse v. Cook*, 31 *Id.* 417; *Collier v. Wenner*, 45 *Barb.* 397; *Genet v. Lawyer*, 61 *Id.* 211; *Smith v. Sergeant*, 67 *Id.* 243; *Van Wyck v. McIntosh*, 2 *Duer.* 86; *New York Exchange Bank v. Jones*, 9 *Daly*, 248. In actions by or against *surviving partners*, see *City Bank of Brooklyn v. McChesney*, 20 N. Y. 240; *Bissell v. Hamlin*, 3 *Bosw.* 383; *Tremper v. Conklin*, 44 N. Y. 58; s. c.,

44 *Barb.* 456; *Comstock v. Hier*, 73 N. Y. 269; *Kale v. Elliott*, 18 *Hun.* 198; *Pettit v. Geesler*, 58 *How. Pr.* 195; *Farley v. Norton*, 67 *Id.* 138. In actions against *corporations*, see *Severn v. Nat. State Bank*, 18 *Hun.* 228; *La Farge v. Exchange Fire Ins. Co.*, 22 N. Y. 352; *Wallace v. Mayor, &c.*, 18 *How. Pr.* 169. See also 3 N. Y. 489; 7 *Id.* 48; 2 *Sandf.* 686, 731. In actions respecting *real property*, generally, see *Mattoon v. Young*, 45 N. Y. 696; *Tooley v. Bacon*, 70 N. Y. 34; *Foote v. Beecher*, 78 N. Y. 155; s. c., 7 *Abb. N. C.* 358; *Pope v. Allen*, 90 N. Y. 298; *Sanford v. Ellithorp*, 95 N. Y. 48; *Re Le Barron*, 67 *How. Pr.* 346; *Champlin v. Seeber*, 56 *Id.* 46; *Witthaus v. Schack*, 24 *Hun.* 328. In actions to *foreclose mortgages*, see *Whitehead v. Smith*, 81 N. Y. 151; *Smith v. Hathorne*, 25 *Hun.* 272; *Hadsall v. Scott*, 26 *Id.* 617; *Wilson v. Reynolds*, 31 *Id.* 46; *Prouty v. Eaton*, 41 *Barb.* 409; *Farnsworth v. Ebbs*, 5 *Thomp. & C.* 1; s. c., 2 *Hun.* 438. In *replevin and trover* suits, see *Waver v. Waver*, 15 *Hun.* 277; *Penny v. Black*, 6 *Bosw.* 50; *Hammond v. Schultze*, 45 *Superior*, 611.

(20) *Testimony of party dying after trial, etc., is evidence on new trial, etc.* "Where a party has died since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing, by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him."<sup>1</sup>

This section applies to a case where the jury disagreed on the first trial; and a party having died before the second trial, his testimony, or that of the surviving party, may be read by the stenographer from his notes taken on the former trial.<sup>2</sup>

(21) *Competency of husband and wife.* "A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage. A husband or wife shall not be compelled, or without consent of the other, if living, allowed to disclose a confidential communication, made by one to the other, during the marriage. In an action for criminal conversation the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff."<sup>3</sup>

(22) *Conviction for crime not to exclude witness; conviction, how proved.* "A person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question, relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question."<sup>4</sup>

<sup>1</sup> Code Civ. Pro. § 830; Laws 1879, ch. 542.

<sup>2</sup> *Lawson v. Jones*, 12 Week. Dig. 551; s. c., 61 How. Pr. 424. See also *Bradley v. Nitick*, 25 Hun, 272.

<sup>3</sup> Code Civ. Pro. § 831. For the decisions under this section, see *infra*, Chap. X.

<sup>4</sup> Code Civ. Pro. § 832; Laws 1879, ch. 542. Before the amendment in

(23) *Confidential communications.* "A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs."<sup>1</sup>

"A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity."<sup>2</sup>

"An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment."<sup>3</sup>

"The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client."<sup>4</sup>

§ 131. **North Carolina.**—A party to an action may be examined as a witness at the instance of the adverse party, either at the trial or conditionally, or upon commission: "*Provided*, no person who is or shall be a party to an action founded on a judgment rendered before the first day of August, one thousand eight hundred and sixty-eight, or on any bond executed prior to said date, or the assignor, indorser or any person who has at the time of the trial, or ever has had, any interest in such judgment or bond, shall be a competent witness on the trial of such action, but this proviso shall not apply to the trial of any action commenced before the first day of August, 1868, nor to the trial of any action in which the defendant therein relies upon the plea of payment in fact, or pleads a counter-claim, and also introduces himself as a witness to establish the truth of such plea, but in all such cases the rules of evidence as contained in this code shall prevail."<sup>5</sup>

1879, this section did not apply to criminal cases. *Perry v. People*, 86 N. Y. 353. See also *supra*, §§ 14-20; *infra*, Chap. IX.

<sup>1</sup> Code Civ. Pro. § 833. For de-

cisions under this and §§ 834, 835 and 836, see *infra*.

<sup>2</sup> *Ibid.* § 834.

<sup>3</sup> *Ibid.* § 835.

<sup>4</sup> *Ibid.* § 836.

<sup>5</sup> Code 1883, Vol. I. p. 228, § 580.

Section 1350 removes all disqualification arising from "interest or crime" in both civil and criminal cases, but does not apply to attesting witnesses to wills.

Parties, and persons in whose behalf any suit or proceeding is brought or defended, are competent and compellable to testify, except in actions for criminal conversation and cases where adultery is in issue.<sup>1</sup>

Section 343 of the Code affords the following rule as to the competency of parties and persons interested, viz.: that in all cases, except where the proposed evidence is as to a transaction, etc., with a person deceased, etc., the common-law disqualifications of being a party and of interest in the event of the action are removed; but as to such transaction, etc., the disqualifications are preserved, with the added one not known to the common law, — that if the witness ever had an interest, upon the question of his competency, it is to be considered as existing at the trial.<sup>2</sup>

But an interest in the *thing* in controversy will not disqualify; it must be an interest in the *event* of the action.<sup>3</sup>

Again, it is only when the transaction is between deceased and the living party, that the latter is forbidden to testify. He may prove a fact which occurred out of the presence of, and which was in no sense a transaction with, the deceased person.<sup>4</sup> Such as transactions with a deceased agent of a deceased principal.<sup>5</sup> So he may testify as to a transaction with two persons, one of whom is dead.<sup>6</sup> Even where direct evidence of a conversation with one deceased is incompetent, a rehearsal of the same in conversation with a son of the deceased may be competent, if part of the *res gestæ*.<sup>7</sup>

The admission of evidence as to a transaction with one deceased, by a witness who, though nominally a defendant, is really a plaintiff in interest, renders competent that of his

<sup>1</sup> *Ibid.* § 1351. For decisions under earlier statutes, as to the competency of parties in *qui tam* and *bastardy* cases, see *State v. Mangum*, Phill. L. 177; *State v. Henderson*, Id. 229. In *will* cases, see *Gunter v. Gunter*, 3 Jones, L. 441; *Pannell v. Scoggin*, 8 Id. 408.

<sup>2</sup> *Peebles v. Stanley*, 77 N. C. 243. S. P., *Mason v. McCormick*, 80 N. C. 244.

<sup>3</sup> *Mull v. Martin*, 85 N. C. 406.

<sup>4</sup> *Lockhart v. Bell*, 86 N. C. 443; s. c., 90 N. C. 499. Compare *Gray v. Cooper*, 65 N. C. 183.

<sup>5</sup> *Morgan v. Bunting*, 86 N. C. 66; *Howerton v. Latimer*, 68 N. C. 370. But compare *McRae v. Malloy*, 90 N. C. 521.

<sup>6</sup> *Peacock v. Stoll*, 90 N. C. 518.

<sup>7</sup> *Treadwell v. Graham*, 88 N. C. 208. To the contrary, see *Perry v. Jackson*, 84 N. C. 230,

co-defendant touching the same transaction.<sup>1</sup> So, where the representative is examined as a witness in his own behalf, concerning transactions with the deceased, the testimony of any person (as the plaintiff), not otherwise rendered incompetent, is admissible to contradict or explain the testimony of such representative.<sup>2</sup> The restriction does not apply to actions under the book-debt law;<sup>3</sup> nor where the representative of the deceased is not a party to the suit.<sup>4</sup> So, also, the grantor of a lost deed, if indifferent between the parties, may testify that he made the deed to one deceased at the time of the trial.<sup>5</sup>

Affidavits needed in the progress of the cause are not included in the inhibition; thus the assignee of a judgment against a decedent may, in support of a motion for an *alias* execution, make affidavit that the deceased had not paid the judgment.<sup>6</sup>

§ 132. *Ohio*. — “All persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.”<sup>7</sup>

“The following persons shall not testify in certain respects.

(1) An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his

<sup>1</sup> *Redman v. Redman*, 70 N. C. 257.

<sup>2</sup> *Murphy v. Ray*, 73 N. C. 588.

<sup>3</sup> *Leggett v. Grover*, 71 N. C. 211.

<sup>4</sup> *Thomas v. Kelly*, 74 N. C. 416.

<sup>5</sup> *Gregg v. Hill*, 80 N. C. 255.

<sup>6</sup> *Latham v. Dixon*, 82 N. C. 55.

But see, also, *Weinstein v. Patrick*, 75 N. C. 344; *Bushee v. Surles*, 77 N. C. 62; *Grier v. Cagle*, 87 N. C. 377.

For further decisions as to the competency of *parties* in actions by or against representatives and guardians, see *Halyburton v. Dobson*, 65 N. C. 88; *Isler v. Dewy*, 67 N. C. 93; *Williams v. Johnston*, 82 N. C. 288; *Syme v. Broughton*, 85 N. C. 367; *Allen v. Gilkey*, 86 N. C. 64; *State v. Osborne*, 67 N. C. 259; *Lewis v. Fort*, 75 N. C. 251; *Mason v. McCormick*, 75 N. C. 263; *Forsyth Co.*

*Commr's v. Lash*, 89 N. C. 159. In actions on *bills* and *notes*, see *Smith v. Haynes*, 82 N. C. 448; *Tabor v. Ward*, 83 N. C. 291. In *will contests*, see *Pepper v. Broughton*, 80 N. C. 251.

For cases under Code 1883, Vol. I. § 580, above quoted, as to actions on bonds executed prior to August 1, 1868, see *Gilmer v. McNairy*, 69 N. C. 335; *State v. Bryant*, Id. 444; *Bradsher v. Brooks*, 71 N. C. 522; *Woodhouse v. Simmons*, 73 N. C. 30; *Ballard v. Ballard*, 75 N. C. 190; *Cannon v. Morris*, 81 N. C. 139; *Ex parte Macay*, 84 N. C. 63; *Jones v. Henry*, Id. 320; *Pugh v. Grant*, 86 N. C. 39; *Morgan v. Bunting*, Id. 66; *Kessler v. Mauney*, 89 N. C. 369.

<sup>7</sup> *Rev. Stat.* (2d ed.) 1880, p. 1278, § 5240.

patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject. (2) A clergyman or priest, concerning a confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs. (3) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made or act done, in the known presence or hearing of a third person competent to be a witness; and the rule shall be the same if the marital relation has ceased to exist. (4) A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify. (5) A person who, if a party, would be restricted in his evidence under section *five thousand two hundred and forty-two*, shall, where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing.”<sup>1</sup>

“A party shall not testify where the adverse party is the guardian or trustee of either a deaf-and-dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee, of a deceased person, except— (1) To facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died. (2) When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent testifies, a party may testify on the

<sup>1</sup> *Ibid.* § 5241.

The disability of interest in the event of the suit was removed by statute in 1850, but that act was held not to apply to parties to the suit, or to any one for whose immediate benefit it was prosecuted or defended. But a stockholder in a corporation which was a party, was held competent. *Lawson v. Salem*

*Bank*, 1 Ohio St. 206. And so was the owner of land proposed to be taken in condemnation proceedings. *Atlantic &c. R. R. Co. v. Campbell*, 4 Ohio St. 583. Statutes prior to the Code, upon this subject, were not repealed by it so far as suits then pending and bills of review were concerned. *Hale v. Wetmore*, 4 Ohio St. 600.

same subject. (3) If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations. (4) If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions. (5) In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued. (6) If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person non-resident of the county; whereupon the book shall be competent evidence; and such book may be admitted in evidence in any case without regard to the parties, upon like proof by any competent witness. (7) If a party, after testifying orally, die, the evidence may be proved, by either party, on a further trial of the case; whereupon the opposite party may testify as to the same matters. (8) If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein.

“Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil, and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied.”<sup>1</sup>

The third exception to section 5242, has been held to render the other party competent, where the representative party, in his own behalf, testifies to a conversation between the deceased and such other party.<sup>2</sup> Subdivision 2 of the same exceptions admits the testimony of a defendant as to transactions with plaintiff's deceased agent, though not occurring in his presence, if within the scope of the agent's

<sup>1</sup> *Ibid.* § 5242.

<sup>2</sup> Rankin v. Hannan, 38 Ohio St. 438.

authority.<sup>1</sup> Under a previous statute,<sup>2</sup> and other enactments, prior to the one quoted above, it was held that in a suit by the assignee of a *chose in action*, the assignor was not a "party," and was therefore admissible to prove facts occurring before the death of the original debtor.<sup>3</sup> Nor did the statutory inhibition apply to the *assignee* of a *chose in action*, where the adverse party claimed as "grantee" of a deceased person.<sup>4</sup> So, also, where an administrator sued two makers of a promissory note, one only of whom defended, the other was held a competent witness for his co-defendant.<sup>5</sup> And the administrator was a competent witness in his own behalf on the settlement of his accounts.<sup>6</sup>

On the other hand, where a surviving partner was plaintiff, the defendant was not permitted to testify as to transactions or conversations with the deceased partner, unless they took place in the presence of the plaintiff.<sup>7</sup> And where a guardian of a weak-minded person brought suit to set aside a deed executed by his ward, before his appointment, the heirs of the grantee, if defendants, were not admitted to prove facts which occurred before the plaintiff's appointment.<sup>8</sup>

§ 133. **Oregon.** — In this State all persons, parties, and persons interested in the event are competent. Neither conviction of crime or want of religious belief disqualifies; but in every case, except the latter, the credibility of the witness may be drawn in question.<sup>9</sup> The exceptions are insane persons and children under ten, husband or wife, without the consent of the other, except in suits by one against the other, or for a crime committed by one against the other. Then follow the usual provisions as to attorneys, clergymen, physicians, and public officers.<sup>10</sup>

§ 134. **Pennsylvania.** — "No interest nor policy of law shall exclude a party or person from being a witness in any civil proceeding: *Provided*, This act shall not alter the law,

<sup>1</sup> Cochran v. Almack, 39 Ohio St. 314.

<sup>2</sup> Code Civ. Pro. § 313; 67 Ohio L. 113.

<sup>3</sup> Myres v. Walker, 9 Ohio St. 558.

<sup>4</sup> Elliott v. Shaw, 32 Ohio St. 431.

<sup>5</sup> Baker v. Kellogg, 29 Ohio St. 663.

<sup>6</sup> Matter of Raab's Estate, 16 Ohio St. 274.

<sup>7</sup> Baxter v. Leith, 28 Ohio St. 84.

<sup>8</sup> McNicol v. Johnson, 29 Ohio St. 85.

For further decisions interpreting these earlier statutes, see Bomberger v. Turner, 13 Ohio St. 263; Stevens v. Hartley, Id. 525; Hubbell v. Hubbell, 22 Id. 208; Mosher v. Butler, 31 Id. 188.

<sup>9</sup> Gen. Laws 1872, § 700.

<sup>10</sup> *Ibid.* §§ 701-703.



as now declared and practiced in the courts of this commonwealth, so as to allow husband and wife to testify against each other, nor counsel to testify to the confidential communication of his client; and this act shall not apply to actions by or against executors, administrators or guardians, nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non* and others, respecting the right of such deceased owner, between parties claiming such right by devolution, on the death of such owner.”<sup>1</sup>

Under the above provisions a legatee is held a competent witness in support of the will, on the trial of a feigned issue to test its validity.<sup>2</sup> The rule applies to a party to commercial paper, negotiated in the ordinary course of business, before maturity.<sup>3</sup> And under it, the evidence of a defendant in his own behalf, although unsupported and positively contradicted by the plaintiff, must be submitted to the jury.<sup>4</sup> Interest in the question does not disqualify; it must be an interest in the case itself.<sup>5</sup> The statute is an enlarging one, and renders no person incompetent as a witness who was competent before its passage.<sup>6</sup>

<sup>1</sup> Bright, Purd. Dig., 1883, Vol. I. p. 727, § 20.

<sup>2</sup> Frew v. Clarke, 80 Pa. St. 171.

<sup>3</sup> State Bank v. Rhoads, 89 Pa. St. 353.

<sup>4</sup> Shaffer v. Clark, 90 Pa. St. 94.

<sup>5</sup> McMurray's Appeal, 101 Pa. St. 421.

<sup>6</sup> Sheetz v. Hanbest, 81 Pa. St. 100; Pratt v. Patterson, Id. 114.

For decisions applying the above and similar principles, in actions by or against *personal representatives* of deceased persons, see Karns v. Tanner, 66 Pa. St. 297; Pattison v. Armstrong, 74 Id. 476; Gray v. Whitney, 81\* Id. 332; Arthurs v. King, 84 Id. 525; Whitney v. Shippen, 89 Id. 22; Harnish v. Herr, 98 Id. 6; Stephens v. Cotterell, 99 Id. 188; Bruner v. Wallace, 14 Phil. 178.

As to the *competency*, in such actions, of the *personal representative*, etc., himself, see Breneman's Estate, 65 Pa. St. 298; McClelland v. West, 70 Id. 183; Guldin v. Guldin, 97 Id.

411; Hyneman's Estate, 11 Phil. 135; White's Estate, 13 Id. 287; Heydrick's Appeal, 1 Atlantic Rep. 31; *distinguishing* Cox v. McKean, 56 Pa. St. 243.

Of the *widow*, or other *distributee*, see Watson's Estate, 11 Phil. 99; Forrester v. Torrance, 64 Pa. St. 29.

As to the effect of introducing the former *testimony* or *deposition* of the *decedent*, see Speyerer v. Bennett, 79 Pa. St. 445; Evans v. Reed, 84 Id. 254; Lacock v. Commonwealth, 99 Id. 207.

Competency of *living party's testimony* on *former trial*, see Pratt v. Patterson, 81 Pa. St. 114.

*Cross-examination of living party*, in such cases, see Lahey v. Heenan, 81 Pa. St. 185; Bierly's Estate, 81\* Id. 419.

For applications of these principles in actions on *bills* and *notes*, see Dean v. Warnock, 98 Pa. St. 565; Alcorn v. Cook, 101 Id. 209. Actions by or against *surviving partners*, see Hanna

§ 135. **Rhode Island.** — “No person shall be disqualified from testifying in any action at law, by reason of his being interested therein or being a party thereto; *Provided*, that whenever an original party to the contract or cause of action is dead, or is shown to the court to be insane, or whenever an executor or administrator is a party to the suit, the other party may be called as a witness by his opponent, but shall not be admitted to testify upon his own offer or upon the call of his co-plaintiff or co-defendant, otherwise than now by law allowed, unless a nominal party merely, or unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the decease of the executor's testate or administrator's intestate; and, *provided further*, that no person shall be admitted to testify in any suit which was pending on the twenty-eight day of March, one thousand eight hundred and seventy-seven, in which either of the parties to the original contract or cause of action was then dead, by virtue of the exceptions aforesaid, as to cases in which the contract in issue was originally made with a person who is living and competent to testify, and as to such acts and contracts as have been done or made since the decease of the executor's testate or administrator's intestate.”<sup>1</sup>

“In the trial of every civil cause, except a petition for divorce, the husband and wife of either party shall be deemed competent witnesses; *Provided*, that neither shall be permitted to give any testimony, tending to criminate the other or to disclose any communication made to him or her by the other, during their marriage.”<sup>2</sup>

“No person shall be deemed an incompetent witness, because of his conviction of any crime or sentence to imprison-

*v. Wray*, 77 Pa. St. 27; *Standbridge v. Catanach*, 83 Id. 368; *Brady v. Reed*, 87 Id. 111; *Hogeboom v. Gibbs*, 88 Id. 235; *Ash v. Guie*, 97 Id. 493; *Runkell v. Phillips*, 9 Phil. 619; *Zeh's Estate*, 13 Id. 272; *Packer v. Noble*, 103 Pa. St. 188. Actions respecting *real property*, generally, see *McFarren v. Mont Alto Iron Co.*, 70 Pa. St. 180; *Oram v. Rothermel*, 98 Id. 300; *Murray v. New York &c. R. R. Co.*, 103 Id. 37. *Ejectment suits*, see *Williams v. Davis*, 69 Pa. St. 21;

*Craig v. Brendell*, Id. 153 (*distinguishing* 66 Id. 297); *Gardner v. McLallen*, 79 Id. 398; *Chase v. Irvin*, 87 Id. 286; *Waltman v. Herdic*, 90 Id. 459; *Ewing v. Ewing*, 96 Id. 381. *Foreclosure suits*, see *Gamble v. Hepburn*, 90 Pa. St. 439. *Trover suits*, see *Hos-tetter v. Schalk*, 85 Pa. St. 220.

<sup>1</sup> Pub. Stat. 1882, p. 587, § 33.

<sup>2</sup> *Ibid.* § 36. See *State v. Borden*, 6 R. I. 495; *Donnelly v. Smith*, 7 R. I. 12.

ment therefor, but shall be admitted to testify like any other witness, except that such conviction or sentence may be shown to affect his credibility.”<sup>1</sup>

“No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent, and the neglect or refusal so to testify shall create no presumption against him.”<sup>2</sup>

“The husband or wife of any respondent in a criminal prosecution offering himself or herself as a witness, shall not be excluded from testifying therein because he or she is the husband or wife of such respondent.”<sup>3</sup>

In this State the disqualification of a party where an executor is an adverse party, has been held to apply only where an executor is a party as representing the estate, and not merely as an appellee.<sup>4</sup>

§ 136. **South Carolina.** — “No person offered as a witness shall be excluded by reason of his interest in the event of the action.”<sup>5</sup>

“A party to an action or special proceeding in any and all courts, and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other party, conditionally, on commission, and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness; *Provided, however,* that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who, previous to such examination, has had such an interest, however the same may have been transferred to or came to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination, deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin,

<sup>1</sup> *Ibid.* § 38.

<sup>2</sup> *Ibid.* § 39.

<sup>3</sup> *Ibid.* § 40.

<sup>4</sup> *Hamilton v. Hamilton*, 10 R. I. 538.

As to the competency of parties under an early statute, upon the issue of usury, see *Sessions v. Richmond*, 1 R. I. 298.

<sup>5</sup> Code Civ. Pro. 1882, p. 115, § 399.

assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination, or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him.

"But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased, or insane person or lunatic, in regard to such transaction or communication, (however the same may have been perpetuated or made competent,) shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section 8 of the Code of Procedure shall be held or construed to affect or restrain the operation of this section.

"(1) In any trial or inquiry in any suit, action or proceeding, in any court or before any person having, by law, or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action, or proceeding.

"(2) No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."<sup>1</sup>

The prohibition of testimony by a party or person interested, as to transactions or communications with deceased

<sup>1</sup> *Ibid.* § 400. As to the competency of parties under former statutes, generally, see *Mosley v. Eakin*, 15 Rich. 324; *Twitty v. Houser*, 7 So. Car. 153. Practice as to examination of adverse party, see *Henken v. Graman*, 2 Rich. 365; *Chapman v. Clark*,

*Id.* 366; *Harrison v. Dodson*, 11 Id. 48. Competency of parties to prove or rebut *usury*, see *Luyten v. Haygood*, 2 Bay, 177; *Harick v. Jones*, 4 McCord, 402; *Wallis v. Nelson*, Harp. 144.

persons, etc., as it existed in the statutes preceding the one recited above, was held not to apply in an action by a trustee appointed by the court in place of a former deceased trustee, against a surety in a bond, so as to shut out the testimony of the principal obligor, in proof of payment of the bond to the deceased trustee.<sup>1</sup> So, also, a purchaser from a deceased person was not, by his purchase, precluded from testifying to declarations of his vendor.<sup>2</sup> And in an action against a town, the plaintiff could testify to transactions between himself and a former intendant of the town, since deceased.<sup>3</sup> Again, in a suit by a remote alicnee of land from one deceased, for the recovery of the land, the defendant could testify to conversations and transactions concerning the land, had by him with the deceased. Such alienee is not a representative within the statute.<sup>4</sup>

On the other hand, an interest in the controversy rendered the witness, though not a party, incompetent to prove communications in the nature of admissions made to him by the deceased.<sup>5</sup> In one case it is held that a party to the action cannot testify as to declarations of the deceased in reference to a personal transaction with himself, even though such declarations were made, not to witness, but to a third person in his presence.<sup>6</sup> But that decision is opposed to the great weight of authority, and to several subsequent adjudications in the same court.<sup>7</sup> In another case it is held that the incompetency of the party is not removed by the introduction of testimony as to the transactions or communications in question, by other witnesses than the representatives themselves.<sup>8</sup>

The word "interest" in section 400 means interest promoted; therefore, in an action by the holder of negotiable paper against the administrator of the principal maker, the sureties may prove the execution of the note by their deceased principal, although they are distributees of his estate.<sup>9</sup>

<sup>1</sup> *Guery v. Kinsler*, 3 So. Car. 423.

<sup>6</sup> *Boykin v. Watts*, 6 So. Car. 76.

<sup>2</sup> *Jones v. Plunkett*, 9 So. Car. 392.

<sup>7</sup> *McLaurin v. Wilson*, 16 So. Car.

See also *Blakely v. Frazier*, 11 Id. 122.

402; *Shaw v. Cunningham*, Id. 631;

<sup>3</sup> *Coleman v. Chester*, 14 So. Car. 286.

*Hughey v. Eichelberger*, 11 Id. 36. See also *supra*, § 130, *subd.* 10.

<sup>4</sup> *Cantey v. Whitaker*, 17 So. Car. 527.

<sup>8</sup> *Brice v. Hamilton*, 12 So. Car. 32.

<sup>9</sup> *Robinson v. Robinson*, 20 So. Car.

<sup>5</sup> *Earle v. Harrison*, 18 So. Car. 329. 567.

§ 137. **Tennessee.** — “Every person of sufficient capacity to understand the obligation of an oath, is competent to be a witness.”<sup>1</sup>

“A negro, mulatto, Indian, or person of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, is incapable of being a witness in any cause, civil or criminal, except for or against each other.”<sup>2</sup>

“A nominal plaintiff, or naked trustee, shall not be incompetent as a witness on account of his being a party to the record.”<sup>3</sup>

“The judge of the court is a competent witness for either party, in any cause tried before him, either of a civil or criminal nature.”<sup>4</sup>

“Persons are rendered incompetent by conviction and sentence for the following crimes, unless they have been restored to full citizenship under the law provided for that purpose, viz.: Abuse of female child, arson, and felonious burning, bigamy, burglary, felonious breaking and entering mansion house, bribery, buggery, counterfeiting, or violating any of the provisions to suppress the same, destroying will, forgery, house-breaking, incest, larceny, perjury, robbery, receiving stolen property, rape, sodomy, stealing free person of color, stealing slaves, stealing bills of exchange or other valuable papers, subornation of perjury.”<sup>5</sup>

“In all suits between corporations and one or more of the stockholders, any other stockholder is a competent witness for either party.”<sup>6</sup>

“In all civil courts, no witness shall be incompetent for the reason that he or she is a party to said cause, or may have an interest in the subject-matter thereof.”<sup>7</sup>

“That chapter 75, entitled an Act to make rules of evidence in the Federal and State Courts uniform, passed on the 13th of March, 1868, be in force from and after the passage of this Act.”<sup>8</sup>

“In all Civil Courts in this State, no person shall be in-

<sup>1</sup> Stat. 1871, p. 1552, § 3807.

<sup>2</sup> *Ibid.* § 3808.

<sup>3</sup> *Ibid.* p. 1553, § 3810.

<sup>4</sup> *Ibid.* § 3811.

<sup>5</sup> *Ibid.* § 3812.

<sup>6</sup> *Ibid.* p. 1554, § 3813.

<sup>7</sup> *Ibid.* § 3813 (a).

<sup>8</sup> *Ibid.* § 3813 (b).

competent to testify because he or she is a party to or interested in the issue tried.”<sup>1</sup>

“In actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court.”<sup>2</sup>

“That the first section, and no other, of the Act passed November 26, 1869, entitled ‘an Act to amend an Act entitled an Act to make the rules of evidence in the Federal and State Courts uniform,’ passed March 13, 1868, and all laws contrary to the provisions of this act be, and the same are hereby repealed.”<sup>3</sup>

“In all cases, where husband and wife sue or are sued jointly, the wife shall not be held incompetent to testify as to the matter and substance in controversy that transpired while she was a *feme sole*, or before marriage, although the husband may have acquired an interest in the subject-matter of the controversy by the marriage.”<sup>4</sup>

In construing the acts of 1869 and 1870 (the provisions corresponding to §§ 3813 (a) and 3813 (c)), the courts have held the assignor of a note competent to testify in favor of the assignee, in a suit against the maker in the name of the assignor;<sup>5</sup> that a railroad employee is competent to prove that an accident was unavoidable;<sup>6</sup> and that the act of 1870 does not render a wife competent to testify for or against her husband where they “sue or are sued jointly.”<sup>7</sup>

As respects transactions and communications with deceased persons, it has been held that on *sci. fa.* in favor of an executrix, to revive a judgment obtained by the testator, the principal debtor in the judgment who was not made a party in the proceedings to revive, is competent to prove the payment of the judgment debt.<sup>8</sup> That heirs-at-law of the deceased may

<sup>1</sup> *Ibid.* § 3813 (c).

<sup>2</sup> *Ibid.* § 3813 (d).

<sup>3</sup> *Ibid.* p. 1555, § 3813 (e).

<sup>4</sup> *Ibid.* § 3813 (f).

<sup>5</sup> *Gardner v. Smith*, 5 Heisk. 256.

<sup>6</sup> *Grable v. Louisville &c. R. R. Co.*,  
<sup>2</sup> Lea, 246.

<sup>7</sup> *Goodman v. Nicklin*, 6 Heisk. 256.

See also, for early adjudications, *Anderson v. Bradie*, 7 Yerg. 297; *Goodner v. Browning*, 9 Humph. 783; *Walker v. Skeene*, 3 Head, 1; *Williams v. Lenoir*, 8 Baxt. 395.

<sup>8</sup> *Kelton v. Jacobs*, 5 Baxt. 574.  
Compare *Aymett v. Butler*, 8 Lea, 453.

prove the declarations made at the time of placing them in possession of property with which they are sought to be charged as advancements.<sup>1</sup> That in an action of replevin against an administrator, the vendor of the plaintiff may testify as to an agreement between himself and the deceased, respecting the chattel in question.<sup>2</sup> And that in an action by a widow in the name of her husband's administrator, to recover damages for the killing of her husband, both the widow and the defendant are competent witnesses as to the circumstances of the killing.<sup>3</sup> So, also, upon the trial of an action against a widow, the plaintiff may testify as to his contract with the deceased husband. The widow is not his representative.<sup>4</sup> Again, in will contests the parties are competent to prove conversations with or declarations of the testator, bearing on the issue.<sup>5</sup> And where one of the makers and the executor of the other maker of a note are sued, and the executor alone appeals from the judgment, the surviving maker is no longer a party to the suit and may testify upon its trial in the appellate court.<sup>6</sup> Where, after the joinder of issue, the complainant has filed his own deposition and died, the defendant may afterwards give his own deposition in evidence. "If the dead has testified, the living may."<sup>7</sup> And a party may testify as to the terms of a contract made by him with the son of the deceased person, acting at the time as his father's agent.<sup>8</sup>

§ 138. **Texas.** — "No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding, or interested in the issue tried."<sup>9</sup>

Husband and wife are competent except as to confidential communications.<sup>10</sup>

In actions by or against personal representatives and guardians neither party may testify "against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party."<sup>11</sup>

"No person shall be incompetent to testify on account of religious opinions, or for want of any religious belief."<sup>12</sup>

<sup>1</sup> O'Neal v. Breecheen, 5 Baxt. 604.

<sup>2</sup> Rielly v. English, 9 Lea, 16.

<sup>3</sup> Hale v. Kearly, 8 Baxt. 49.

<sup>4</sup> Johnson v. Hall, 9 Baxt. 351.

<sup>5</sup> Orr v. Cox, 3 Lea, 617.

<sup>6</sup> Fuqua v. Dinwiddie, 6 Lea, 645.

<sup>7</sup> Bingham v. Lavender, 2 Lea, 48.

<sup>8</sup> Cottrell v. Woodson, 11 Heisk. 681.

<sup>9</sup> Rev. Stat. 1879, art. 2246.

<sup>10</sup> *Ibid.* art. 2247.

<sup>11</sup> *Ibid.* art. 2248.

<sup>12</sup> *Ibid.* art. 2249.

As to the right of *parties* to testify



As regards testimony concerning "transactions with or statements by" deceased persons, it has been held that where suit is brought against a firm, and one of the defendants dies pending the suit, the plaintiff may testify to declarations of the deceased partner where his personal representatives have not been made parties;<sup>1</sup> that where the deceased person's deposition has been admitted, the other party may testify to the same matters;<sup>2</sup> and that the rule of exclusion does not apply when the suit is against co-defendants, of whom only one is dead, and the contract was made either with the living co-defendant or with the living and the dead concurrently.<sup>3</sup>

On the other hand, it is held that one who sues an administrator for services rendered, and supplies furnished, to the deceased, is not competent to prove such labor or supplies, or their value;<sup>4</sup> that the testimony of an administrator to a conversation between deceased and defendant, to establish the contract on which he sues, is not admissible;<sup>5</sup> that testifying, in an action against an executor, to having entrusted money to the deceased to be loaned by him, is testifying to a transaction with deceased within the statutory prohibition;<sup>6</sup> that where heirs are made parties defendant after the death of the original defendant, the plaintiff cannot testify as to conversations, etc., with such original defendant,<sup>7</sup> and that a party to a suit against heirs, claiming the property in controversy through their deceased ancestor, is precluded from testifying, not only as to statements made by the deceased to him, and to transactions had between the deceased and himself, but also as to such statements and trans-

under earlier statutes, in certain cases, see *Parsons v. Phipps*, 4 Tex. 341; *Gillespie v. Redmond*, 13 Id. 9; *Tucker v. Willis*, 24 Id. 247. Right of party to prove his own account, see *Hipp v. Ingram*, 3 Tex. 17; *McGee v. Curry*, 4 Id. 217; *Johnson v. Ward*, 21 Id. 475. Substituting new bond in order to examine a surety, see *Drake v. Brander*, 8 Tex. 351.

As to the former practice on the examination of an adverse party by means of interrogatories, see *McMillan v. Croft*, 2 Tex. 397; *Beal v. Alexander*, 6 Id. 531; *Harrison v. Knight*, 7 Id. 47; *Handley v. Leigh*, 8 Id. 129; *Ford v. Clements*, 13 Id. 592; *Meyer v.*

*Claus*, 15 Id. 516; *Lovett v. Casey*, 17 Id. 594; *Dikes v. Cordova*, Id. 618; *Walker v. Burbridge*, Id. 650; *Clardy v. Callicoate*, 24 Id. 170; *Garthwaite v. Hart*, Id. 314; *Gill v. Campbell*, Id. 405; *Morrison v. Bean*, 25 Id. (Supp.) 442; *McGown v. Randolph*, 26 Id. 492; *Busby v. Scott*, 29 Id. 196.

<sup>1</sup> *Roberts v. Yarboro*, 41 Tex. 449.

<sup>2</sup> *Runnels v. Belden*, 51 Tex. 48.

<sup>3</sup> *Bennett v. Frary*, 55 Tex. 145.

<sup>4</sup> *Barnhill v. Kirk*, 44 Tex. 590.

<sup>5</sup> *Stringfellow v. Montgomery*, 57 Tex. 349.

<sup>6</sup> *Altgelt v. Brister*, 57 Tex. 432.

<sup>7</sup> *McCampbell v. Henderson*, 50 Tex. 601.

actions between deceased and third persons, although occurring at a time when the witness had no interest in such statements or transactions.<sup>1</sup>

§ 139. **Utah.** — All persons are competent in any action or proceeding, except in actions or proceedings by or against the representatives of a deceased person, “when the facts to be proved transpired before the death of such deceased person. . . .”<sup>2</sup> The exceptions are persons convicted of felony, unless pardoned or the conviction reversed on appeal;<sup>3</sup> husband and wife, unless the action or proceeding is by one against the other;<sup>4</sup> attorneys;<sup>5</sup> clergymen;<sup>6</sup> physicians;<sup>7</sup> and public officers,<sup>8</sup> the language being substantially the same as in the statutes of California.<sup>9</sup>

§ 140. **Vermont.** — “No person shall be disqualified as a witness in a civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same, as a party or otherwise; but such interest may be shown for the purpose of affecting his credit.”<sup>10</sup>

“In actions, except actions of book account, where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor, except to meet and explain the testimony of living witnesses produced against him as to facts or circumstances taking place after the death or insanity of the other party; or upon a question upon which the testimony of the party afterward deceased or insane has been taken in writing or by a stenographer in open court, to be used in such action, and is used therein.”<sup>11</sup>

“No person shall be incompetent as a witness in any court, matter, or proceeding, on account of his opinions on matters of religious belief; nor shall a witness be questioned, nor testimony be taken or received, in relation thereto.”<sup>12</sup>

“No person shall be incompetent as a witness in any court, matter, or proceeding, by reason of his conviction of a crime

<sup>1</sup> Parks v. Caudle, 58 Tex. 216.

<sup>2</sup> Comp. L. 1876, p. 505, §§ 374, 375, 377.

<sup>3</sup> *Ibid.* § 378.

<sup>4</sup> *Ibid.* § 379.

<sup>5</sup> *Ibid.* § 380.

<sup>6</sup> *Ibid.* § 381.

<sup>7</sup> *Ibid.* § 382.

<sup>8</sup> *Ibid.* § 383.

<sup>9</sup> *Supra*, p. 159.

<sup>10</sup> Rev. Stat. 1880, p. 243, § 1001.

<sup>11</sup> *Ibid.* § 1002.

<sup>12</sup> *Ibid.* § 1007.

other than perjury, subornation of perjury, or endeavoring to incite or procure another to commit the crime of perjury; but the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness.”<sup>1</sup>

Under the law, as it stood prior to the enactment of section 1002,<sup>2</sup> with regard to the testimony of the living party, where the other party was dead, an agent or officer through whom a contract was made, was not in any legal sense regarded as a party to the contract, so that his death should operate to exclude the testimony of the other party to the contract.<sup>3</sup> The prohibition extends not only to the surviving party to the record, but to one not a party to the record, if he is a party to the contract in issue and on trial.<sup>4</sup>

Where the administrator defendant introduces, under a plea of accord and satisfaction, a writing from his intestate to the plaintiff, the latter cannot explain the writing, and show what was said and done when it was made and delivered to him.<sup>5</sup> So, also, in an action to set aside a gift as having been induced by undue influence, if the donee be dead the donor cannot testify in his own behalf.<sup>6</sup> And in an action by a woman's guardian to annul her marriage with her deceased husband, on the ground that her consent was obtained by fraud, she is not a competent witness.<sup>7</sup> So, also, the payor of a negotiable note cannot testify to the fact of a payment, the note having been assigned subsequently, the payee being dead and the suit brought in the name of the assignee.<sup>8</sup>

It has been very recently held that a husband who is administrator of the estate of his wife's father, she being sole heir, is a competent witness in an action, prosecuted by him as administrator, to recover damages occasioned by the defendant raising his dam, and thereby causing the water to set back on the intestate's land; and this on the ground that the wife was not an actual party to the suit, and section 1001 had removed the disqualifying element of interest. But if

<sup>1</sup> *Ibid.* § 1008.

<sup>2</sup> Gen. Stat. ch. 36, § 24.

<sup>3</sup> *Poquet v. North Hero*, 44 Vt. 91.

<sup>4</sup> *Davis v. Windsor Savings Bank*, 48 Vt. 532. Compare *Tute v. James*, 50 Vt. 125.

<sup>5</sup> *Woodbury v. Woodbury*, 48 Vt. 94.

<sup>6</sup> *Wade v. Pulsifer*, 54 Vt. 45.

<sup>7</sup> *Davis v. Plymouth*, 45 Vt. 492.

<sup>8</sup> *Farmers' Mut. Fire Ins. Co. v. Wells*, 53 Vt. 14. See also *Hall v. Hamblett*, 51 Vt. 589; *Read v. Sturtevant*, 40 Vt. 521.

the husband were disqualified because of his wife's interest, her release, executed to a third party in trust for her husband, with an indemnity to her against costs, would not remove his incompetency. In such a case the defendant is not a competent witness under section 1003, to prove facts that bear directly upon the main issue; or facts collateral to the issue, if immaterial; or a contract evidenced by deed, though made with a party now living.<sup>1</sup>

§ 141. *Virginia*. — "No witness shall be incompetent to testify because of interest; and in all actions, suits, or other proceedings of a civil nature, at law or in equity, before any court, or before a justice of the peace, commissioner, or other person having authority by law, or by consent of parties to hear evidence, the parties thereto, and those on whose behalf such action, suit, or proceeding is prosecuted or defended, shall, if otherwise competent to testify, and subject to the rules of evidence and of practice applicable to other witnesses, be competent to give evidence on their own behalf, and shall be competent and compellable to attend and give evidence on behalf of any other party to such action, suit, or proceeding, except as hereafter provided; but in any case at law, the court may, for good cause shown, require any party to attend in person and testify *ore tenus*, or exclude his deposition upon his failure to attend."<sup>2</sup>

"Nothing in the preceding section shall be construed to alter the rules of law now in force, in respect to the competency of husband and wife as witnesses for or against each other during the coverture, or after its termination, nor in respect to attesting witnesses to wills, deeds, or other instruments; and where one of the original parties to the contract, or other transaction, which is the subject of the investigation, is dead, or insane, or incompetent to testify, by reason of infamy, or any other legal cause, the other

<sup>1</sup> *Wiley v. Hunter*, 2 East. Rep. 228.

For decisions under earlier statutes as to competency of parties, generally, in actions by or against personal representatives, see *Kimball v. Baxter*, 27 Vt. 628; *Hulett v. Hulett*, 37 Vt. 581; *Calderwood v. Calderwood*, 38 Vt. 171; *Graham v. Chandler*, Id. 559; *Ford v. Cheney*, 40 Vt. 153; *Dawson v. Wait*, 41 Vt. 626; *Morse v. Low*, 44

Vt. 561. How the rule was applied in actions of *book-account*, see *Johnson v. Dexter*, 37 Vt. 641; *Hunter v. Kirtledge*, 41 Vt. 359; in *ejectment suits*, see *Hollister v. Young*, 41 Vt. 156. Effect of the rule on the testimony of *husband and wife*, see *Wood v. Shurtleff*, 46 Vt. 325; *Davis v. Davis*, 48 Vt. 502.

<sup>2</sup> Code of 1873, p. 1109, § 21.

party shall not be admitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying, unless he shall be first called to testify on behalf of such last-mentioned party, *or unless some person having an interest adverse to that of the party so incapable of testifying, shall have previously testified to some fact occurring before such inability accrued; or unless the contract or other transaction, which is the subject of the investigation, was made or had with the agent of the party so incapable of testifying, who is alive and competent to testify; or unless, in the case of partners or joint contractors, when the person who has become incapable of testifying was not the only partner or other joint contractor with whom such contract or other transaction was personally made or had; and where one of the parties is an executor, administrator, curator, or committee, or other person representing a dead person, an insane person, or a convict in the penitentiary, the other party shall not be permitted to testify in his own favor, unless such contract or other transaction was originally made or had with a person who is living and competent to testify, except as to such things as have been done since the powers of such fiduciary were assumed; and except, also, when some other party in interest has previously testified; or unless some person having an interest adverse to the party so incapable of testifying, shall have previously testified as aforesaid: provided, however, that no witness who would have been competent to testify as the law stood before the passage of this and the preceding section, shall be rendered incompetent hereby.*"<sup>1</sup>

Under the first clause of section 21, an accomplice not yet convicted was held competent.<sup>2</sup>

The decisions interpreting section 22 are few, and will be found collected in the note.<sup>3</sup>

<sup>1</sup> *Ibid.* § 22, as amended by Laws 1876-7, ch. 256, p. 265. The amendment consisted, substantially, in the addition of the words italicized in the text. Chap. 256 only added the last proviso, the other amendments having been previously made by the same legislature. Laws, 1876-7, ch. 198, p. 184.

<sup>2</sup> *Oliver v. Commonwealth*, 77 Va. 590; and see this case as to competency of infants.

<sup>3</sup> *Field v. Brown*, 24 Gratt. 74; *Mason v. Wood*, 27 Id. 783; *Grigsby v. Simpson*, 28 Id. 348; *Buckholder v. Ludlam*, 30 Id. 255; *Morris v. Grubb*, Id. 286; *Parent v. Spitler*, Id. 819; *Reynolds v. Callaway*, 31 Id. 436; *Carter v. Hale*, 32 Id. 115; *Simmons v. Simmons*, 33 Id. 451; *Knick v. Knick*, 75 Va. 12; *Kelly v. Board of Public Works*, Id. 263; *Keran v. Trice*, Id. 690.

§ 142. **Washington Territory.** — “Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; Indians shall be competent witnesses as hereinbefore provided, or in any prosecutions in which an Indian may be a defendant.”<sup>1</sup>

The statute as to witnesses in civil cases contains provisions similar to those of the western states and territories, in many respects, and the repetition of its verbiage here is unnecessary. The local practitioner will notice such differences as may vary the construction given to the provisions referred to.<sup>2</sup>

It has been recently held that in an action by an administrator to recover property of his intestate converted by defendant, who sets up as a defense that he took said property as administrator of deceased, an heir or distributee, who is not a party to the record nor directly interested in the result of the action, is not rendered incompetent as a witness on behalf of the defendant by the statute last cited.<sup>3</sup>

§ 143. **West Virginia.** — “No person offered as a witness in any civil action, suit, or proceeding, shall be excluded by reason of his interest in the event thereof.”<sup>4</sup>

“A party to a civil action, suit, or proceeding, may be examined as a witness in his own behalf, or in the behalf of any other party, in the same manner and subject to the same rules of examination as any other witnesses, except as follows: (1) An assignor of a *chose in action* shall not be examined in favor of his assignee, unless the opposite party be living; (2) A party shall not be examined in his own behalf, in respect to any transaction or communication had personally with a deceased person, against parties who are the executors, administrators, heirs-at-law, next of kin, or assignees of such deceased person, where they have acquired title to the cause of action from or through such deceased person, or have been sued as such executors, administrators, heirs-at-law, next of kin, or assignees. But where such executors, administrators, heirs-at-law, next of kin, or assignees, shall be examined on their own behalf, in regard to any conversation or transac-

<sup>1</sup> Code, 1881, § 1069.

<sup>2</sup> See *supra*, §§ 101, 103, 104, 106.

<sup>3</sup> *McCoy v. Ayers*, 5 Pac. Rep. 843.

<sup>4</sup> Rev. Stat. 1879, ch. 85, § 22.

tion with such deceased person, then the said assignor or party may be examined in regard to the same conversation or transaction; (3) If the deposition of a party to the action, suit, or proceeding has been taken, and he shall afterwards die, and after his death such deposition be used upon any trial or hearing in behalf of his executors, administrators, heirs-at-law, next of kin, or assignees, the other party, or assignor, shall be a competent witness as to any and all matters to which such deposition relates; (4) This and the preceding section shall not apply to any action, suit, or proceeding, commenced prior to the seventh day of February, eighteen hundred and sixty-eight, in which a judgment or final decree has been obtained, and a new trial or rehearing has been or shall be awarded therein; but in all such actions, suits, or proceedings, the rules of evidence shall be the same as if this and the preceding section had not been enacted; (5) A husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife; (6) A guardian, committee, or other fiduciary shall not be examined as a witness against his ward, or the person he represents, as to any transaction in his fiduciary capacity, unless the ward or person affected thereby is in a condition to testify as to the same transaction; (7) A party to an action, or person interested in the event thereof, shall not testify in his own behalf against a deaf or dumb person, unless the evidence of such deaf or dumb person has been taken in the case.”<sup>1</sup>

“No person shall be incompetent as a witness on account of race or color.”<sup>2</sup>

In interpreting subdivision (1) of section 23, the courts have held that where both the assignor and the assignee of a *chose in action* are parties to a suit to recover the money due upon such *chose in action*, and the debtor is dead, the assignor is incompetent to testify in favor of his assignee. And a release, made by the assignee to the assignor, from all and every liability to recourse or otherwise, as assignor of the *chose in action*, does not make the assignor competent to testify in favor of the assignee.<sup>3</sup> This subdivision has been held

<sup>1</sup> *Ibid.* § 23.

<sup>2</sup> *Ibid.* § 24. For decisions under earlier statutes, see *Lazzell v. Mapel*,

1 W. Va. 43; *Zink v. Wilson*, 3 Id. 503; *Newlind v. Beard*, 6 Id. 110.

<sup>3</sup> *White v. Heavner*, 7 W. Va. 324.

not to apply to actions against surviving partners, they not being deemed "assignees," in law, of their deceased partners.<sup>1</sup>

Under subdivision (2) of section 23, it has been held that a witness is not thereby disqualified unless he is called to testify in his own behalf;<sup>2</sup> in which case, being the plaintiff, he cannot testify as to services rendered by him to the deceased person.<sup>3</sup> But if the administrator plaintiff examines an heir-at-law as a witness relative to a transaction between the decedent and the defendant, alleged to render the defendant liable, the latter is competent to testify in his own behalf as to that transaction, though not as to others.<sup>4</sup>

In construing subdivision (3) of the same section, the deposition of the living party is held to be inadmissible, though taken before the death or the deceased, if offered afterwards.<sup>5</sup>

§ 144. **Wisconsin.** — "No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest in the event of the same, as a party or otherwise; and every party shall be in every such case a competent witness, except as otherwise provided in this chapter. But such interest or connection may be shown to affect the credibility of the witness."<sup>6</sup>

"No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person, or with a person then insane, in any civil action or proceeding, in which the opposite party derives his title, or sustains his liability, to the cause of action, from, through or under such deceased person or such insane person, or in which such insane person is a party prosecuting or defending by guardian; unless such opposite party shall first be examined, or examine some other witness in his behalf, concerning some transaction or communication between the deceased or insane person and such party or person, or unless the testimony of such deceased person, given in his lifetime, or of such insane person, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction

<sup>1</sup> *Carlton v. Mays*, 8 W. Va. 245.

<sup>2</sup> *Beall v. Shaul*, 18 W. Va. 258.

<sup>3</sup> *Owens v. Owens*, 14 W. Va. 88.

<sup>4</sup> *Metz v. Snodgrass*, 9 W. Va. 190.

<sup>5</sup> *Zane v. Fink*, 18 W. Va. 693.

<sup>6</sup> *Rev. Stat. 1878*, p. 991, § 4068.



or communication of which testimony is so given, or to the matters to which such testimony relates.”<sup>1</sup>

“No party, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party, or an agent of the person from, through or under whom such adverse party derives his interest or title, when such agent is dead or insane, or otherwise legally incompetent as a witness; unless the opposite party shall first be examined, or examine some other witness in his behalf, in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given, or to the matters to which such testimony relates.”<sup>2</sup>

“A husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage, without the consent of the other. In an action for criminal conversation, the plaintiff’s wife is a competent witness for the defendant as to any matter in controversy, except as aforesaid.”<sup>3</sup>

“A person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer.”<sup>4</sup>

“A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.”<sup>5</sup>

“No person duly authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional

<sup>1</sup> *Ibid.* § 4069.

<sup>2</sup> *Ibid.* § 4070.

<sup>3</sup> *Ibid.* § 4072.

<sup>4</sup> *Ibid.* § 4073.

<sup>5</sup> *Ibid.* § 4074.

character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.”<sup>1</sup>

“An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment.”<sup>2</sup>

The provision restricting the examination of a surviving party to a transaction, against the representative of the party deceased, only forbids his testifying as to any transaction or communication had personally with the deceased. His testimony, that he had received by mail a certain letter purporting to be written by the decedent before his death, could not be directly contradicted by deceased, if living, and therefore such testimony is admissible.<sup>3</sup> So, in a suit by the representative, the defendant may testify to conversations had by him with plaintiff's witnesses touching matters sworn to by them, but not as to agreements or conversations had between him and plaintiff's intestate, or payments made by him to the latter.<sup>4</sup>

Again, where the executor sues the alleged makers of a note made payable to his testator, the defence being alteration after execution, one of the defendants may testify as to when and with what ink he signed the note, and whether he struck out words in the printed form which appeared to have been stricken out.<sup>5</sup> And in an action for the conversion of notes belonging to the decedent and payable to bearer, a witness for the defence may state the facts and circumstances under which he obtained possession of the notes.<sup>6</sup> In neither of the last two instances is the testimony

<sup>1</sup> *Ibid.* § 4075.

<sup>2</sup> *Ibid.* § 4076.

For decisions under previous statutes, allowing a party to testify in his own behalf, after calling the adverse party, or after giving him notice of his intent to testify, see *Ecker v. Moore*, 2 Chand. 85; *Hart v. Janes*, 1 Wis. 61; *Miller v. Waterman*, 2 Id. 90; *Hubbell v. Noonan*, 8 Id. 214; *Smith v. Swarthout*, 15 Id. 550; *Sika v. Chicago, &c. R. Co.*, 21 Id. 370; *Ernst v. The Brooklyn*, 22 Id. 649; *First Nat. Bank v. Wood*, 26 Id. 500; *Potter v. Mena-*

*sha*, 30 Id. 492. As to the right of a defendant to prove *usury*, see *Dudley v. Beck*, 3 Wis. 274. Competency of parties under early statutes, in actions on bills and notes, see *McHose v. Cain*, 22 Wis. 486; in actions for divorce, see *Hays v. Hays*, 19 Wis. 182; in actions to try title to land, see *Wisconsin Bank v. Morley*, 19 Wis. 62.

<sup>3</sup> *Daniels v. Foster*, 26 Wis. 686.

<sup>4</sup> *Koenig v. Katz*, 37 Wis. 153.

<sup>5</sup> *Page v. Danaher*, 43 Wis. 221.

<sup>6</sup> *Adams v. Allen*, 44 Wis. 93.

relative to a transaction with the deceased. And the testimony of a party as to transactions by him with a deceased person from whom the opposite party derives title may properly be received, so far as it is merely an admission against his interest of payments made by such deceased person.<sup>1</sup>

On the other hand one who dealt with an agent, since deceased, cannot prove the statements of such agent, in relation to a transaction between himself and such deceased agent;<sup>2</sup> and the fact that a deposition of such deceased agent, which had been taken on the part of the plaintiff, to be used on the trial, has been put in evidence *by the defendant*, will not render the latter competent to testify as to his transactions with such agent referred to in the deposition.<sup>3</sup> One partner is an agent of his co-partners, within this rule.<sup>4</sup>

Again, an administrator who has paid out of the estate of his intestate money for the support and education of the heirs, without an order of the court, in proving the items so paid is within the prohibition of sections 4069 and 4070, and cannot testify in his own behalf, as a witness, in respect to any transaction or communication in relation to such payments, by him personally, with a deceased heir to whom it is alleged such payments were made for the benefit of the other heirs.<sup>5</sup>

§ 145. **Wyoming Territory.** — Neither interest in the event, the fact of being a party to the record, nor conviction of crime, will exclude a witness, but these facts may be shown to affect the credibility of the witness.<sup>6</sup> The exceptions are, persons of unsound mind at the time of production to testify, children under ten, husband and wife, attorneys, clergymen, and assignors who were incompetent before the assignment was made.<sup>7</sup>

With regard to transactions with deceased persons, etc., it is provided as follows: —

“No party shall be allowed to testify by virtue of section three hundred and nineteen, when the adverse party is the

<sup>1</sup> Crowe v. Colbeth, 24 N. W. Rep. 478.

<sup>2</sup> Cornell v. Barnes, 26 Wis. 473.

<sup>3</sup> McIndoe v. Clarke, 15 N. W. Rep. 17.

<sup>4</sup> Rogers v. Brightman, 10 Wis. 55; Lawrence v. Vilas, 20 Id. 381. See also Bill v. Stoll, 55 Id. 216.

<sup>5</sup> In re Fitzgerald, 15 N. W. Rep. 794.

<sup>6</sup> Laws 1876, p. 73, § 319.

<sup>7</sup> Ibid. § 321. The language is substantially the same as contained in the Kansas statute, § 3851. See *supra*, p. 183, and in the Kentucky statute, § 26. See *supra*, p. 185.

guardian of an idiot, or a lunatic, or a deaf and dumb person, or the executor or administrator of a deceased person, or the guardian of a child or children of a deceased person, when the facts to be proved transpired before the death of such deceased person, except in suits upon contracts which shall have been entered into by deceased persons, by agents, in which cases, if the agent be a witness, the opposite party may testify as to all that transpired between such party and the agent in relation to such contract, and the making of the same; excepting, also, cases where the claim or defence is founded on book account, then the party shall be permitted to testify that the entries are in his handwriting, that the book containing the same is his book of original entries, and if the original entries in said book of accounts have been made by a person who at the time of such trial is deceased, or a disinterested person, who is a non-resident of the Territory, on proof of such decease and non-residence, and that said entries are in the handwriting of such person, or such proof by the party as hereinbefore provided, then it shall be competent to admit said book of original entries as evidence, the weight to be given to such evidence in either case, however, being left to the court or jury to determine; and in all actions by or against a surviving partner or partners, or a surviving joint contractor or contractors, any party to the action shall be incompetent as a witness to testify to transactions which took place with, or declarations or admissions made by the deceased partner, or joint contractor, in the absence of the surviving partner or joint contractor. The deposition of a party shall not be used in his own behalf, unless the legal notice required in the cases where depositions are to be taken shall also specify that the deposition to be taken is that of the party; *Provided*, That if the deposition of a party be taken in any pending suit, and such party shall die before the trial thereof, it shall be lawful for the opposite party to testify as to all matters contained in said deposition.”<sup>1</sup>

<sup>1</sup> *Ibid.* § 320.

## CHAPTER IX.

### STATUTORY COMPETENCY OF DEFENDANTS IN CRIMINAL CASES.<sup>1</sup>

- § 146. In General; and herein of the Necessity of a Statute.
- § 147. Character of the Enabling Acts.
- § 148. Extent of the Right to testify.
- § 149. Right to show Intent.
- § 150. Effect of Omission to testify; Comments by Counsel.
- § 151. Effect of becoming a Witness; Legitimate Comments.
- § 152. His Testimony Admissible against him on a New Trial.
- § 153. Statement of Accused.

§ 146. **In General; and herein of the Necessity of a Statute.**—In a former chapter we discussed the common-law rules as to the competency of accused persons as witnesses,<sup>2</sup> and found that according to those rules, a sole defendant in a criminal case could not testify at all, but that one of two or more jointly charged, could, under certain circumstances, testify either against or on behalf of the others.<sup>3</sup>

But the tendency of legislation and adjudication, ever since the reform movement began, has been in the direction of the removal of the barriers of incompetency, and the ancient theory of closing the mouth of the witness, lest he falsify, has given way to the modern one of encouraging free expression, that truth and justice might not be stifled by technicalities. The rule in civil actions of permitting the parties to testify has, in very many of the states and territories, and very recently in England, been extended to criminal cases,

<sup>1</sup> For a compilation of the statutes on this subject, the reader is referred to the note at the end of this chapter, page 257.

<sup>2</sup> *Supra*, § § 42, 43.

<sup>3</sup> For further decisions as to the competency of one defendant as a witness for or against one jointly charged with the same offence, see *State v. Gigher*, 23 Iowa, 318; *State v. Nash*, 10 Id. 81; *State v. Stewart*, 51 Id. 312. *Chandler v. Commonwealth*, 1 Bush

(Ky.) 41; *Christian v. Commonwealth*, 13 Id. 264; *Commonwealth v. Brown*, 130 Mass. 279; *Lisle v. Commonwealth*, 6 Ky. L. Rep. 229; *State v. Drake*, 4 West Coast Rep. 574; *State v. Barrow*, 76 Me. 401; *People v. Van Alstine*, 6 Crim. L. Mag. 715; *Oliver v. Commonwealth*, 77 Va. 590; *Henderson v. State*, 70 Ala. 23; *Moore v. State*, 15 Tex. App. 1; *State v. Henderson*, 47 Ind. 127.

and not only the injured complainant, but the accused defendant likewise, has had the door of the witness-box opened to him.

But it is only by virtue of the several enabling acts that defendants in criminal proceedings are permitted to testify in their own behalf. The courts have uniformly maintained the doctrine that the statutes removing the incompetency of parties and others because of their interest in the event have no application to criminal cases.<sup>1</sup> The relaxation of the common-law rule as to parties had no application to prosecutions for crime.<sup>2</sup>

<sup>1</sup> In *Deloohery v. State*, 27 Ind. 521, the court, per Elliott, C. J. say:—"A party to a suit was not a competent witness therein for himself at common law. And as the state has only removed the disability in civil causes and proceedings, and not in criminal ones, the latter are still governed by the common-law rule." And previously the same court, in *Hoagland v. State*, 17 Ind. 488, held that although in *civil* causes and proceedings, no person should be disqualified as a witness because he is a party, or interested in the event; and parties may testify on their own behalf, or compel the adverse party to testify; and although the criminal practice act contained the following provision: "The following persons are competent witnesses: *First*. All persons who are competent to testify in civil actions," defendants in criminal cases were not competent to testify, inasmuch as at the time of the enactment of the statute regulating the competency of witnesses in criminal cases, the parties to civil actions remained incompetent as at common law, and, since the amendment abrogating the rule was expressly directed to civil causes or proceedings, the provision of the criminal practice act intended to adopt the law of competency in civil actions, *as it then stood*, not as it might thereafter become, and the ruling of the court below rejecting the defendant as a witness was sustained and the judgment of conviction affirmed. So, also, in Michigan,

under the statute permitting a defendant "to make a statement," it was held in *People v. Thomas*, 9 Mich. 314, that he should not be permitted to *testify*. Under the Bankrupt Law of 1867, as amended in 1874, whereby the alleged bankrupt became a competent witness, it was held in *United States v. Black*, 12 Bankr. Reg. 340, in the U. S. Circuit Court, Massachusetts, that he was not a competent witness in a criminal proceeding against him for secreting assets and fraudulently omitting them from the schedules. The state statute does not extend to United States courts held within the boundary of the state. *United States v. Hawthorne*, 1 Dill. (U. S.) 422. In Pennsylvania, under the statute (prior to amendment of 1877) granting the privilege only to persons charged with offences "not above the grade of misdemeanor," it was held in *Stevick v. Commonwealth*, 78 Pa. St. 460, that a defendant was incompetent to testify, if there be a count in the indictment for felony joined with that of misdemeanor. *S. P., Hunter v. Commonwealth*, 79 Pa. St. 503.

<sup>2</sup> *Patterson v. People*, 46 Barb. (N. Y.) 625; *Williams v. People*, 33 N. Y. 688. *S. P., State v. Bixby*, 39 Iowa, 465; *State v. Darrington*, 47 Iowa, 518; *State v. Connell*, 38 N. H. 81; *State v. Flanders*, Id. 324; *Commonwealth v. Lenox*, 12 Phil. (Pa.) 601.

§ 147. **Character of the Enabling Acts.**— These enactments are permissive merely. Some few of them only permit the accused to make a “statement” to the jury, sworn, or unsworn,<sup>1</sup> if he chooses to do so; but the great majority of them provide that the accused *may* be a *competent* witness. Nowhere do we find it in terms stated that he *shall* be a *compulsory* one, and as statutes in derogation of the common law are construed strictly;<sup>2</sup> and furthermore, as the fifth amendment to the constitution of the United States establishes as the fundamental law that “no person . . . shall be compelled in any criminal case to be a witness against himself,” it may safely be asserted that nowhere can the prosecution force the accused to testify against his will.<sup>3</sup> The sole purpose of permitting him to testify on his own behalf is to enable him to present his own defence.<sup>4</sup> The constitutionality of these acts has rarely been questioned, and in one well-considered case, has been distinctly asserted.<sup>5</sup>

§ 148. **Extent of the Right to testify.**— The effect of these enabling acts is to remove all the disabilities of the defendant, and to permit him to present such a statement as he can, in exoneration of the crime with the commission of which he stands charged.<sup>6</sup> The examination is governed by the same rules as are applied to other witnesses. The fact that the proof is strong against him, and his story an improbable one, affords no ground for rejecting his testimony.<sup>7</sup> Therefore where the court, upon the cross-examination of the accused, having developed the fact that he had previously served a term in the state prison, instructed the jury wholly to disregard his testimony, this was held erroneous, since while the court were to decide as to its admissibility, the jury had the right to determine the degree of credit to which it was entitled.<sup>8</sup>

<sup>1</sup> *Infra*, § 153.

<sup>2</sup> “When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility when the end of the act appears to be larger than the enacting words.” Potter’s *Dwaris* on Stat. 186.

<sup>3</sup> *State v. Cohn*, 9 Nev. 179.

<sup>4</sup> *People v. Quick*, 51 Mich. 547.

<sup>5</sup> *State v. Bartlett*, 55 Me. 200.

<sup>6</sup> *Delamater v. People*, 5 Lans. (N. Y.) 332.

<sup>7</sup> *State v. Kelly* (Iowa), 11 N. W. Rep. 635; *Marx v. People*, 63 Barb. (N. Y.) 618; *Bralich v. People*, 65 Id. 48.

<sup>8</sup> *Newman v. People*, 63 Barb. (N. Y.) 630. As to the competency of a defendant in bastardy proceedings, see *People v. Duell*, 6 Abb. (N. Y.) Pr. 285; *Carter v. Krise*, 9 Ohio St. 402.

His counsel should be allowed to interrogate him as in case of other witnesses, the prosecutor objecting to improper questions.<sup>1</sup>

In discussing the right of a female defendant to testify in her own behalf, the court of appeals of New York say: "For this purpose she left her position as a defendant, and, while upon the stand, was subject to the same rules, and called upon to submit to the same tests, which could by law be applied to other witnesses."<sup>2</sup>

In Indiana, where the fact that a defendant on trial for murder, called at the house where the alleged homicide transpired, two days after its occurrence, and there held a whispered conversation with the deceased's widow, who was jointly indicted with him for the homicide, was given in evidence, it was held that the defendant, when on the stand, might testify as to what was said, the court saying: "It is exceedingly unjust to an accused party to admit his act in evidence, and to allow it to be insisted that the act is one of criminality or evidence of criminality, and at the same time to exclude what was said by the accused, at the time of, and connected with the act, in explanation of its character. The naked act may import, or be construed as importing criminality, when, taken in connection with what was said, it may be innocent or even commendable."<sup>3</sup> And in another case, where evidence was introduced tending to show that the defendant had attempted to suborn witnesses, it was held that he might testify that he had in no way communicated with them.<sup>4</sup>

The extent to which he shall testify, is for the defendant himself to determine. He can so limit his testimony as to avoid danger of self-crimination, either on the direct or cross-examination, for that, as a rule, can go no further than is necessary to discover the whole truth upon the matters introduced upon the direct. As tersely stated by Judge Cooley, "if he does so testify he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the

<sup>1</sup> *Clark v. State*, 50 Ind. 514.

<sup>3</sup> *Morrow v. State*, 48 Ind. 432.

<sup>2</sup> *Brandon v. People*, 42 N. Y. 265,  
268.

<sup>4</sup> *Donohue v. People*, 56 N. Y. 208.



statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger."<sup>1</sup>

§ 149. **Right to show Intent.** — One of the greatest benefits derived by the accused from the enabling statutes, is that an opportunity is afforded him to explain his acts and words as they have been shown by the testimony for the prosecution. Oftentimes the most innocent, inadvertently, or perhaps in trustful faith, by their conduct, place themselves in positions where suspicion strongly attaches to them; numerous connecting circumstances environ them, and acts and words, in fact the most innocuous, are introduced as links in the chain, which, drawn about the unfortunate with anaconda-like tightness, would doubtless crush him; but the strength of a chain is that of its weakest link: shatter but a single one, and its entire power is gone. Therefore if the accused can but show that the questioned acts and words are in reality of a character entirely different, and were employed for a purpose entirely different from that which apparently actuated them, the chain of circumstantial evidence breaks. Who can show this better than he whose words and acts are in question? Who other than he can testify as to the mental operation of intent of which these are manifestations?<sup>2</sup>

<sup>1</sup> Const. Lim. (4 Ed.) 389. See *infra*, Chaps. XXI., XXII.

<sup>2</sup> Article by R. V. W. Du Bois, Esq., in 4 Crim. Law Mag. p. 323. In *People v. Farrell*, 31 Cal. 576, the court say: "The rule that the intent must be inferred from the acts and words of the party, had its foundation in necessity created by the rule which excluded parties in interest from the witness stand. That necessity is now removed by the abrogation of the rule which created it, and the legal tenet that actions must speak for themselves, and words furnish their own interpretation, is much modified, if not wholly abrogated, by the recent innovation upon the common law, by which parties are allowed to testify in their own behalf. Before that time, there was no way of ascertaining the motives and intentions of parties, ex-

cept by inference from their acts and sayings, and all experience shows that they may frequently, if not at all times, prove very imperfect guides. The object of the recent changes, as we conceive, was not merely to enable parties to disclose facts wholly within their own knowledge, but to do in addition what theretofore had been impossible, — explain their acts and the motives with which they were performed, and to explain if need be, what they meant or intended to be understood as meaning, by what they may have said in regard to any material fact. It is presumed that there are but few members of the legal profession who have not, at one time or another, felt the harshness, if not the injustice, of the rule which excluded parties from the witness stand, and closed the door to explanations

Where the defence against a charge of homicide is that it was justifiable, the defendant when testifying is entitled to state to the jury whether at the moment of the killing he did, or did not, really believe he was in danger of losing his life, or of receiving great bodily harm, for the purpose of showing the condition of his mind at the time, and for the purpose of establishing one of the necessary conditions of justification; it being left to the jury to weigh and consider the question whether such testimony is true or false.<sup>1</sup>

§ 150. **Effect of Omission to testify; Comments by Counsel.**—In view of the constitutional provision that “no person shall be compelled in any criminal case to be a witness against himself,” and realizing that the statutes are designed to confer a privilege, not to impose a burden; that it is the indefeasible constitutional right of the accused that the prosecution must, unaided by him, make out its case against him beyond all reasonable doubt; that his position is defensive and he cannot be turned against himself, the effect of his omission to make himself a witness is easily ascertained; for independent of the provisions of the enabling acts that no such omission shall operate prejudicially to him, the higher law of the constitution affords him perfect protection.<sup>2</sup>

which otherwise could have been made, and would have given a very different color to the transaction. Actions and words are liable to misconstruction, as all human experience proves. Actions apparently suspicious become innocent when the motive with which they were performed is understood. Words are often of a very different import when spoken in earnest and when spoken in jest; when imperfectly understood and when fully explained. If, under the new rule, parties are to be kept in harness and not allowed to explain their actions and words, when they admit of explanation, and when explanation is needed in order to exhibit the whole truth, but half the evil that was felt under the old rule has been removed.”

<sup>1</sup> *State v. Harrington*, 12 Nev. 125. Defendant on trial for assault with a deadly weapon with intent to kill, should be permitted to testify concerning his intent in doing any act

which is claimed to prove criminal intent, *Kerrains v. People*, 60 N. Y. 221; so in case of a trial for conspiracy to obtain a promissory note by false and fraudulent representations, *Babcock v. People*, 15 Hun (N. Y.) 347. Apparently, *Bolen v. State*, 26 Ohio St. 371, runs counter to this doctrine; but careful reading, with examination of the citations, will show that the question was not properly presented to the appellate court, since the record did not state the nature of the expected answer, or affirmatively show that the exclusion of the evidence was prejudicial to the prisoner, as the settled rule of practice in Ohio requires.

<sup>2</sup> 4 *Crim. Law Mag.* 348. This precise point was presented in *People v. Tyler*, 36 Cal. 522, and as to it, *Sawyer C. J.* says:—“At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and

Allusions by the prosecuting officer, in his summing up, to the fact that the accused had omitted to avail himself of the opportunity to testify, and any, even the slightest attempt to draw therefrom an inference of guilt, constitute reversible error, if objected to and the court declines to interfere.<sup>1</sup> In

puts upon the people the burden of affirmatively proving the offence alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if at the trial, when, for all purposes of the trial, the burden is on the people to prove the offence charged, by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act of declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the constitution, which say, in substance, that he shall not be compelled to criminate himself. *If the inference in question could be legally drawn, the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*

"Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest

in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question." S. P., *Price v. Commonwealth*, 77 Va. 393.

<sup>1</sup> *Price v. Commonwealth*, *supra*. Allusions and arguments of this sort were made by the district attorney in the case last cited, the court overruling defendant's objection, and refusing the following request to charge: "The jury should not draw any inference to the prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him." For these errors the conviction was reversed on appeal, the court saying: "We are of opinion, therefore, that the court erred in permitting the district attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and, especially after what had transpired, in refusing the instruction asked on behalf of the defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury. We think such instruction proper in all cases where the defendant desires it." This case was followed in *People v. Brown*, 53 Cal. 66; and the same view of this question was taken by the Supreme Court of Vermont in *State v. Cameron*, 40 Vt. 555.

one respectable decision it is held that the error is not cured even though the presiding judge admonish the counsel and instruct the jury to give no heed to his objectionable remarks.<sup>1</sup>

In a leading New York case, where the court in charging the jury alluded to the omission of the accused to testify, but subsequently, upon his attention being called to it, stated to the jury that there was no law requiring the prisoner to be sworn, and that no inference should be drawn against him because he did not take the stand, it was held that the error was thereby cured.<sup>2</sup> But, in a later case, it is said to be the duty of the court to *prevent* the prosecuting counsel commenting upon this matter.<sup>3</sup>

<sup>1</sup> Long v. State, 56 Ind. 182.

<sup>2</sup> Ruloff v. People, 45 N. Y. 213.

<sup>3</sup> Crandall v. People, 2 Lans. (N. Y.) 309. "This court has decided that such silence cannot be taken into consideration by the jury in determining whether a defendant is or is not guilty, and that an equivocal instruction upon this matter entitles the defendant to a new trial, Chief Justice Chapman saying: 'It is important that courts should carefully guard his constitutional right.' (Commonwealth v. Harlow, 110 Mass. 411.) And as there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect. . . . The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged; and the presiding judge, in permitting such a course of argument against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed, for their not testifying, committed an error which

was manifestly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial." Per Gray, C. J., in Commonwealth v. Scott, 123 Mass. 239.

In a prosecution for keeping intoxicating liquors with intent to sell them, the only evidence to connect the accused with the offence was the fact that he was seen in a room adjoining the bar-room in which the liquors were. It was held that he was not called upon to explain his presence there; that the benefit of the provision that "his neglect or refusal to testify shall not create any presumption against him," was to be preserved in spirit as well as in letter; and that, therefore, the reading by the court to the jury of a charge given in another case upon a different state of facts, as to the inference of guilt that may be drawn from a failure to offer explanatory evidence, when it was apparent that if it be true, such evidence is within the power of the accused, was erroneous as tending to mislead the jury, although qualified by the statement that the evidence which it must be apparent he can produce, must be evidence other than his own testimony. Commonwealth v. Maloney, 113 Mass. 211

In Maine, it was formerly the rule that the fact that the accused did not testify was a proper one for the consideration of the jury in determining his guilt or innocence, State v. Bart-

§ 151. **Effect of becoming a Witness; Legitimate Comments.** — While the accused cannot be criticised because he has failed to take the stand, yet, if he has done so, he has rendered himself subject to adverse comment the same as any other witness.

Where, in the exercise of his rights, he has testified but partially, and so carefully guarded his speech that no permissible cross-examination will elicit the facts of which it is but fair to suppose he is possessed, then it is eminently proper for the prosecuting counsel to review his testimony with such a running commentary upon it as may be necessary to sustain any reasonable hypothesis formed from the other evidence. Again, his endeavoring to retire within the bomb-proof of privilege to avoid the hot fire of cross-examination, together with his general appearance and conduct while on the stand, both as to matter and manner, are legitimate subjects for critical comment within the usual boundaries.<sup>1</sup>

When he becomes a witness he is made competent for all purposes in the case, and if, by his own testimony, he can, if innocent, explain and rebut, a fact tending to show his guilt, and he fails so to do, the same presumption arises from his failure as would arise from a failure to give the explanation by another witness, if in his power to give it.<sup>2</sup>

§ 152. **His Testimony Admissible against him on a New Trial.** — The rule in civil actions is, that where a party has been examined as a witness on his own behalf, and thereafter a new trial is had, and he does not take the stand upon such second trial, he may usually be required to do so upon the demand of his opponent, and, if material and proper, interrogated concerning his testimony given at the former trial, which may thus be used against him. In criminal proceedings an analogous course is allowable. Of course the defendant cannot, either upon the first or second trial, be compelled to testify; but if on the second trial he omits to exercise his

lett, 55 Me. 200; even if the defendant be a woman, 59 Me. 298; and the judge may so instruct them, *State v. Lawrence*, 57 Me. 574. But by § 1 of ch. 92, Laws of 1879, this was changed, and the rules above stated are believed to be general throughout the Union. See also, 3 *Crim. Law Mag.* 161, 162.

<sup>1</sup> The testimony of the prisoner who has taken the stand in his own behalf is a fair subject of criticism, and counsel for the people is at liberty to comment upon the failure of the prisoner to contradict a witness for the people. *Solander v. People*, 2 Col. 48.

<sup>2</sup> *Stover v. People*, 56 N. Y. 315.

privilege, his testimony previously given is admissible in evidence against him.<sup>1</sup>

§ 153. **Statement of Accused.** — In several of the States<sup>2</sup> legislation has not yet progressed sufficiently to permit the accused to testify as a witness in the cause; but he may make a statement, as it is called.<sup>3</sup>

The purpose of the statutes is to give every person on trial an opportunity to make full explanation to the jury, in respect to the circumstances given in evidence, which are supposed to have a bearing against him.<sup>4</sup> The defendant has a right to make his statement, and to that statement the jury may give such weight as in their judgment it may be

<sup>1</sup> In *State v. Eddings*, 71 Mo. 545, the court, per Henry, J., say: "On a former trial the defendant voluntarily offered himself as a witness, and at the trial now under review, Mr. Phillips, a juror on the former occasion, was called by the state to testify what the testimony of defendant then was. . . . It is contended that his statement so made can only be received in evidence as a confession, and to be admissible as a confession, it must have been voluntary. He had his option to testify or not, and when he voluntarily became a witness, he volunteered to answer all proper questions propounded on cross-examination. He became as any other witness. He took the risk of answering any questions on cross-examination for the advantage of testifying in chief in his own behalf. It cannot, with any propriety, be said that his answers to questions asked him on cross-examination were involuntary. He chose to put himself in a position which invited them. He offered himself as a witness to tell the whole truth, not only what made for him, but what would be against him; not only to answer questions propounded by his counsel, but those propounded by the state. He was not to be treated as a witness as to his testimony-in-chief, and as a party to his testimony on cross-examination." To the same effect, *Commonwealth v. Reynolds*, 122 Mass. 454.

The decision in *State v. Witham*, 72

Me. 531, is to the effect that his cross-examination, legally obtained in one criminal prosecution, is admissible as evidence against him in another, if pertinent to the issue.

"An accused person, with his consent, may become a witness either for or against himself at the preliminary examination before the magistrate; and if he voluntarily becomes a witness under such circumstances as to render it clear that his testimony was purely voluntary, and free from restraint or undue influence, there is no reason why it should not be given in evidence against him on his subsequent trial for the offence. If his voluntary, unsworn statement may be proved against him as a confession, his voluntary statement under oath, given in a proceeding in which he elects and is authorized to testify, ought to stand upon at least as favorable a footing." *People v. Kelley*, 47 Cal. 125; *followed*, *State v. Glass*, 50 Wis. 218.

<sup>2</sup> Alabama, Florida, and Georgia. Formerly also in Michigan (*People v. Thomas*, 9 Mich. 314) and until quite recently in Great Britain.

<sup>3</sup> In Florida, this statement is under oath; in the other States it is not. In Wyoming Territory, he may, in lieu of testifying, make an unsworn statement. See the several statutes collected in the note at the close of this chapter.

<sup>4</sup> *Annis v. People*, 13 Mich. 511.

entitled to, dependent ordinarily upon its consistency, its naturalness and its inherent probabilities, and a charge to that effect is not erroneous.<sup>1</sup> Generally, the appropriate charge on the effect of the prisoner's statement is in the language of the statute.<sup>2</sup> It is error to charge that the statement in general "and in this case" is not sufficient, as a general rule, to overcome the testimony of a sworn credible witness. The jury should be left free to give to the statement in the case on trial such credence as they may think proper.<sup>3</sup> Also, error to charge that the jury "cannot take such statement into consideration as evidence."<sup>4</sup> It is objectionable in the court to discredit the prisoner's statement by comparing it with the evidence and showing discrepancies.<sup>5</sup> Or to limit or restrict the jury in their consideration of it.<sup>6</sup>

The prisoner, while on the stand, is entitled to the assistance of counsel in directing his attention to any branch of the case, that he may make explanations concerning it if he desires.<sup>7</sup> But the prisoner is not under examination, and his counsel has no right to ask him questions. Doubtless the court might, at the prisoner's request, permit questions to be put to him as a matter of discretion.<sup>8</sup>

In a Florida case the court refused to allow the statement of the accused to be made, unless he was put upon the stand as a witness, subject to cross-examination. This was held to be erroneous, as "the making of such a statement under oath does not constitute the accused a witness, nor does it subject him to the rules applicable to witnesses, making him liable to cross-examination. It is simply a presentation, verbally, in his own language and manner, of the matters pertaining to his defence, of such facts and circumstances surrounding the case as will go to excuse the offence and negative the idea of willful and corrupt intent."<sup>9</sup> But the state may introduce evidence to contradict any facts stated by the prisoner in his statement before the jury.<sup>10</sup>

<sup>1</sup> *Reich v. State*, 63 Ga. 616. To same effect, *Maher v. People*, 10 Mich. 212; *People v. Arnold*, 40 Mich. 710.

<sup>2</sup> *Brown v. State*, 60 Ga. 210.

<sup>3</sup> *Day v. State*, 63 Ga. 667; *Durant v. People*, 13 Mich. 351.

<sup>4</sup> *Barber v. State*, 13 Fla. 675. *Contra Chappell v. State*, 71 Ala. 322.

<sup>5</sup> *Tucker v. State*, 57 Ga. 503.

<sup>6</sup> *Pease v. State*, 63 Ga. 631.

<sup>7</sup> *Annis v. People*, 13 Mich. 511.

<sup>8</sup> *Brown v. State*, 58 Ga. 212. But see *Chappell v. State*, 71 Ala. 322.

<sup>9</sup> *Miller v. State*, 15 Fla. 576.

<sup>10</sup> *Holsenbake v. State*, 45 Ga. 43. *S. P.*, *Burden v. People*, 26 Mich. 162.

In *Bird v. State*,<sup>1</sup> the court charged the jury that "they might take into consideration the fact that defendant failed to make a statement, and give to that such weight as they might see fit with other evidence; and if, upon the whole, they should believe him guilty, they should so find: otherwise not." This was held to be erroneous, and a new trial was granted, the court saying: "We do not think that the statute giving this right to the defendant intended that it should be counted against him, if he did not avail himself of it."

The prisoner does not cease to be a defendant by becoming a witness, nor forfeit rights by accepting a privilege, "while his constitutional right of declining to answer questions cannot be removed, yet a refusal by a party to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury."<sup>2</sup>

<sup>1</sup> 50 Ga. 585.

<sup>2</sup> Campbell, J., in *people v. Thomas*, *supra*.

NOTE. — The provisions, in the several jurisdictions, enabling the accused to testify in his own behalf (or make a "statement" as the law stands in a few of them), are as follows: —

**Federal Courts, Including the Territorial Courts and the District of Columbia.** — General Laws Forty-Fifth Congress, Second Session, ch. 37 (Supplement to Rev. Stat. vol. 1, p. 312):

"Be it enacted, &c., That in the trial of all indictments, informations, complaints or other proceedings against persons charged with the commission of crimes, offences and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him."

**Alabama.** — House Bill 62, Session of 1882: "An act to permit defendants to make statements in their own behalf in all trials of indictments, complaints, or other criminal proceedings.

"Sec. 1. Be it enacted by the General Assembly of Alabama, That on the trial of all indictments, complaints or other criminal proceedings, it shall be competent for the defendants to make a statement as to the facts in their own behalf, not under oath.

"Sec. 2. Be it further enacted, That shall any defendant fail to make a statement, as provided for in the previous section, it shall not militate or be made the subject of comment against him." Approved December 2, 1882.

**Arizona Territory.** — Comp. Laws, 1877, p. 101, § 408: "An act entitled 'An act for the protection of the rights of persons prosecuted for crime,' approved January 27, 1881.

"All persons charged by indictment or otherwise with violation of the criminal code of this territory shall be competent to testify upon their trial for such offences, if they choose so to do, providing that in all cases wherein the defendant declines to testify the court shall instruct the jury that the fact of the defendant's declining to testify must not be construed by them as raising any presumption against him."

**California.** — Penal Code, § 1323, (Desty's edition), 1881: "A defendant in a criminal action or proceeding



cannot be compelled to be a witness against himself, but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot, in any manner, prejudice him, nor be used against him on the trial or proceeding."

**Colorado.** — Amendment of act approved February 5th, 1872 (see Laws, 1872, p. 95, and General Laws, 1877, p. 341), by act approved February 8th, 1881. Session Laws, 1881, p. 114: "Hereafter, in all criminal cases tried in any court of this state, the accused, if he so desire, shall be sworn as a witness in the case, and the jury shall give his testimony such weight as they think it deserves; but in no case shall a neglect or refusal of the accused to testify be taken or considered any evidence of his guilt or innocence."

**Connecticut.** — Public Acts, 1879, ch. 69, p. 421: "Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial, and if such person has a husband or wife, he or she shall be a competent witness, but may elect or refuse to testify for or against the accused, except that a wife when she has received violence from her husband, may, upon his trial therefor, be compelled to testify in the same manner as any other witness; the neglect or refusal of an accused party to testify shall not be commented upon to the court or jury."

**Florida.** — McClellan's Digest of Laws, 1881, ch. 101, § 29, p. 519: "In all criminal prosecutions, the party accused shall have the right of making a statement to the jury, under oath, of the matter of his or her defence."

**Georgia.** — Code, 1882, § 4637: "In all criminal trials in this State, the prisoner shall have the right to make to the court and jury such statement in the case as he or she may deem [proper] in his or her defence, said statement not to be under oath, and

to have such force only as the jury may think right to give it [and the jury may believe such statement in preference to the sworn testimony in the case]; *Provided*, the prisoner shall not be compelled to answer any questions on cross-examination, should he or she think proper to decline to answer such questions."

**Idaho Territory.** — Rev. Laws, "Crimes and Punishments," ch. 3, § 12, p. 321: "The party or parties injured shall, in all cases, be competent witnesses, and the party accused and prosecuted in any criminal proceeding, or for any crime, shall be a competent witness or witnesses on his or her own behalf, but no criminal shall be compelled to testify against him or herself in any case. The credibility of all such witnesses shall be left to the jury, as in other cases."

**Illinois.** — Revised Statutes of Illinois (Cothran's annotated edition), 1880, ch. 38, Div. 13, § 6; ("Criminal Code," § 426, p. 530): "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; *Provided, however*, that a defendant in any criminal case or proceeding shall only, at his own request, be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

**Indiana.** — Rev. Stat. 1881, ch. 4, (entitled "Criminal Procedure,") art. 15, § 225; § 1798 of Rev. Stat. "The following persons are competent witnesses:—

"*First.* All persons who are competent to testify in civil actions.

"*Second.* The party injured by the offence committed.

"*Third.* Accomplices, when they consent to testify.

"*Fourth.* The defendant, to testify in his own behalf. But if the defendant do not testify, his failure to do so

shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case in its charge, to instruct the jury as to their duty under the provisions of this section."

**Iowa.**—Rev. Code (Miller's annotated edition), 1880, § 3636 [all after the first sentence was added by § 1 of ch. 168 of the Laws of 1878]: "Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state, and should a defendant elect not to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should he do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall, for that cause alone, be entitled to a new trial.

"Sec. 3637. Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." The force of § 3637 will be apparent when we consider that prior to the enactment of § 1, ch. 168, Laws of 1878 (approved March 26, 1878, amending § 3636 of the code, so as to place it in its present form), defendants in criminal proceedings were not competent witnesses in their own behalf. *State v. Laffer*, 38 Iowa, 422; and see note to § 3636 in 2 McClain's Annotated Statutes, 917.

**Kansas.**—Comp. Laws (Dassler's edition), 1881, ch. 82, entitled "Procedure, Criminal," Art. 11, § 215, (Grand Number, § 4707): "No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded, or intended to be injured

or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution, or by reason of his being the person on trial or examination, or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting his or her credibility; *Provided*, That no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination; *And provided further*, That the neglect or refusal of the person on trial to testify, or of a wife to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place."

(4708), § 215 a. "Sec. 2. If the accused shall not avail himself of his right to testify in any case, it shall not be construed to affect his innocence or guilt."

**Maine.**—Rev. Stat. (official), 1871, title 11, ch. 134, § 10, p. 888: "... In all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness. The husband or wife of the accused shall be a competent witness when either is called, with the consent of the respondent."

In 1879 the legislature passed a bill, approved February 14th, 1879, entitled "An act relating to the testimony of persons accused of crime," and being ch. 92, Laws of 1879, which reads as follows:—

"Sec. 1. The fact that the defendant in a criminal prosecution does not testify in his own behalf, shall not be taken as evidence of his guilt.

"Sec. 2. The defendant in a criminal prosecution who testifies in his own behalf, shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime than that for which he is on trial."

Concerning § 2, the Supreme Judicial Court say, in *State v. Witham*, 72 Me. 531, it "neither excludes evidence

which charges or confesses extraneous criminalities, the evidence of which, from circumstances, becomes relevant and material to the main question in issue."

**Maryland.**—Rev. Code, 1878, § 3, p. 750: "In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes and offences, and in all proceedings in the nature of criminal proceedings in any court of this state, and before a justice of the peace or other officer acting judicially, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him."

**Massachusetts.**—Pub. Stat. 1882, ch. 169, § 18, p. 987: "No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence as a witness in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: . . .

"*Third.* In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him."

**Michigan.**—Formerly it was permissible in this State for the accused to "make a statement to the court or jury." The law (Comp. Laws, 1871, title 30, ch. 188, § 100, grand number of section, 5967, vol. 2, p. 1715) reading that ". . . Nothing in this act shall be construed as giving the right to compel a defendant in criminal cases to testify, but any such defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined upon any such statement"; but as now amended in 1881 (Pub. Acts, Session of 1881, No. 245, p. 335), it reads: "No person shall be disqualified as a witness in any criminal case or proceeding by

reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; *provided, however*, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

**Minnesota.**—General Statutes of Minnesota, 1878, § 7, p. 792: ". . . And on the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court."

**Mississippi.**—By ch. 78, Laws 1882, § 1603, the Revised Code of 1880 was amended so as to read as follows:—

"Sec. 1603. The accused shall be a competent witness for himself in any prosecution against him; and the failure of the accused in any case to testify in his own behalf shall not operate to his prejudice, nor be commented on by counsel." For decisions under the law as it stood before amendment, see *Howze v. State*, 59 Miss. 230; *Williamson v. State*, Id. 235; *Owens v. State*, Id. 547.

**Missouri.**—Code of Pro. (Winslow's annotated edition) 1879, ch. 24, entitled "Of Crimes and Criminal Procedure," Art. 18, § 1918, p. 412: "No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting the credibility of such witness; *provided*, that no person

on trial or examination, nor wife nor husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination as to any matter referred to in his examination-in-chief, and may be contradicted and impeached as any other witness in the case; *provided*, that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife; if the accused shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial of the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

**Nebraska.** — Comp. Stat. 1881, § 473, p. 735: "... In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal."

**Nevada.** — Comp. Laws, §§ 2305, 2306, p. 552: —

"Sec. 1. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court.

"Sec. 2. Nothing herein contained shall be construed as compelling any such person to testify; and in all

cases wherein the defendant to a criminal action declines to testify, the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause."

**New Hampshire.** — Gen. Laws, 1878, §§ 25, 26, p. 532: —

"Sec. 25. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, the person so charged shall, at his own request, but not otherwise, be a competent witness.

"Sec. 26. Nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of his guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify."

**New Jersey.** — Rev. 1877, § 8, p. 378: "Upon the trial of any indictment, allegation or accusation of any person charged with crime, the person indicted or accused shall be admitted to testify as a witness upon such trial, if he shall offer himself as a witness therein in his own behalf."

**New York.** — In this State the first enactment was that of ch. 678, Laws, 1869, incorporated in Revised Statutes (Banks & Brother's 6th edition), Vol. 3, p. 1032, and was as follows: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, and in all proceedings in the nature of criminal proceedings in any and all courts, and before any and all officers and persons acting judicially, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him."

Under this statute the great majority of the judicial decisions in this State upon this subject were rendered; hence its present value for the purposes of comparison.

Code Crim. Pro. 1881, § 393: "The defendant in all cases may testify as a witness in his own behalf,

but his neglect or refusal to testify does not create any presumption against him."

**North Carolina.** — Laws, 1881, ch. 110, § 2: "That in the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offences, and misdemeanors in the superior, inferior, criminal, and justices' of the peace courts of this State, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him." See also Code, 1883, Vol. 1, p. 541, § 1353.

**Ohio.** — Rev. Stat. 1880, § 7286, p. 1709: "On the trial of all indictments, complaints, and other proceedings against a person charged with the commission of an offence, the person so charged shall, at his own request, but not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor any comment be made upon, such neglect or refusal."

**Oregon.** — Gen. Laws, 1872, §§ 162, 163, 166. A sole defendant in a criminal case cannot be a witness, but one of two or more jointly accused persons may be discharged from the indictment, and he may then testify for the State or his co-defendant.

**Pennsylvania.** — Here the innovation made its way step by step. By act No. 23, Laws of 1872, persons on trial "charged with the commission of crimes or offences, not above the grade of misdemeanor, in any court of record of criminal jurisdiction," might, at their own request, be deemed competent witnesses; but "neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor shall any comment be made upon, such neglect or refusal, by counsel in the case, during the trial of the cause; *provided*, that this act shall not extend to the trial of any person on an indictment for perjury or forgery."

The succeeding year, by an act approved June 20, 1873 (see Laws, 1874, No. 220, p. 331), the provisions of the act of 1872 were extended so as to afford "the class of witnesses therein named the privilege of testifying in all courts of criminal jurisdiction."

Theretofore it was available in courts of *record* only.

The march of liberality continuing, Laws, 1877, No. 43, p. 45, widens the range and enacts as follows: "That in the trial of all indictments, complaints, and other proceedings, in any court of criminal jurisdiction, against persons charged with the commission of misdemeanors and felonies, except felonies triable exclusively in the Court of Oyer and Terminer, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but his or her neglect, omission, or refusal to testify shall not create any presumption against him or her, nor shall any reference be made to, nor shall any comment be made upon, such neglect, omission, or refusal, by counsel in the case, during the trial of the cause."

In 1879, by Act No. 158 (p. 149, Laws, 1879), receivers of stolen goods were, upon their trial, permitted to testify in their own behalf, with the same rights in the case of neglect, omission, or refusal so to testify as remain to the accused under the general statute.

**Rhode Island.** — Pub. Stat. 1882, ch. 214, § 39: "No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent; and the neglect or refusal so to testify shall create no presumption against him."

**South Carolina.** — Gen. Stat. 1882, §§ 2231-2233, p. 639: —

"Sec. 2231. In the trial of all criminal cases the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case.

"Sec. 2232. No person shall be required to answer any question tending to criminate himself, nor shall

husband or wife be required to disclose any communication made to each other during their coverture.

"Sec. 2233. Testimony given under the provisions of Sections 2231 and 2232 of this chapter shall not be afterwards used against the person testifying in any other criminal case, except upon an indictment for perjury founded on that testimony."

**Utah Territory.** — "Criminal Procedure" Act, § 422 (Laws, 1878, p. 151): "A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give his consent shall not in any manner prejudice him, nor be used against him on the trial or proceeding."

**Vermont.** — Rev. Laws, 1880, § 1655, p. 348: "On the trial of indictments, complaints, informations and other proceedings against persons charged with crimes or offences, the person so charged shall, at his own request, and not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court; but the refusal of such person to testify shall not be considered by the jury as evidence against him."

**Virginia.** — The observations upon the Laws of Pennsylvania (*supra*) are applicable here, where the advances of legislation have been more deliberate even than there.

Code, 1873, § 25, p. 1110: "Hereafter in all prosecutions for assault and battery and unlawful trespass, the accused may be sworn and examined as a witness in his own behalf."

In 1878 a "Criminal Code" was enacted (ch. 311 Acts of Assembly, 1877-78), and by § 19 of ch. 14 thereof, as amended by ch. 228 of the Acts of Assembly, 1881-82, we learn that ". . . Hereafter in all prosecutions for assault and battery, unlawful trespass and in all prosecutions under Sections ten and eleven of Chapter two of new Criminal Code, approved March fourteen, eighteen hundred and seventy-eight, the accused

may be sworn and examined as a witness on his own behalf."

Section 10, above referred to, prescribes the penalty for "malicious wounding, with intent to maim, disfigure, disable or kill," and § 11 that for shooting, etc., in committing, or attempting to commit, a felony.

**Washington Territory.** — Code, § 1067, p. 200: ". . . Any person accused of any crime in this territory by indictment or otherwise, may, in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when such accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examinations of other witnesses; *provided*, that nothing in this act shall be construed to compel such accused person to offer himself or herself as a witness in such case; and *provided further*, that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf."

**West Virginia.** — Sections 19 and 20 of the Code, as amended by ch. 151 of the acts of 1882 (passed March 27th, 1882), p. 484, read: —

"Sec. 19. In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, at his or her own request, but not otherwise, be a competent witness on such trial and examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness on such trial and examination; but a failure to make such request shall not create any presumption against him or her, nor shall any reference be made to, nor comment upon, such failure by any one during the progress of the trial in the hearing of the jury.

"Sec. 20. In a criminal prosecution, other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."

**Wisconsin.**—Rev. Stat. 1878, § 4071, p. 992: "In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness; but his refusal or omission to testify shall create no presumption against him, or any other party thereto."

**Wyoming Territory.**—Laws, 1878,

p. 25, under head of "Criminal Laws":—

"Sec. 1. The defendant, in all criminal cases, in all the courts of this territory, may be sworn and examined as a witness, if he so elect, but shall not be required to testify in any case.

"Sec. 2. If the defendant so elect, he may make a statement to the jury without being sworn."

## CHAPTER X.

### RULES AS TO HUSBAND AND WIFE.

- § 154. The Common-law Rule excluding them.
- § 155. Scope and Extent of the Rule.
- § 156. Not Competent against each other.
- § 157. Or for each other.
- § 158. Or to prove Non-access.
- § 159. Proving the Marriage—its Duration Immaterial.
- § 160. Limits and Exceptions to the Rule.
- § 161. Collateral Proceedings.
- § 162. Cases of Agency.
- § 163. Effect of Consent, or Release of Interest.
- § 164. Surviving Husband.
- § 165. Widow.
- § 166. Divorced Spouse.
- § 167. Cases of Personal Injuries.
- § 168. Actions for Divorce, or to annul the Marriage.
- § 169. Actions for Abduction, or for Criminal Conversation.
- § 170. Criminal Actions.

§ 154. **The Common-law Rule excluding them.**—The rule of the common law excluding parties from the witness-box also excluded the husband or wife of a party, as a witness for or against the party.<sup>1</sup> Where the husband was a party, the wife could not testify,<sup>2</sup> nor could she where the husband was disqualified by reason of interest in the event;<sup>3</sup> so, also, the wife being a party, the husband was incompetent.<sup>4</sup>

This rule was founded partly on their identity of interest, and partly on a principle of public policy lying at the basis

<sup>1</sup> Co. Litt. 6 b; Gilb. Ev. 119; B. N. P. 286; *White v. Stafford*, 38 Barb. (N. Y.) 419; *Bihin v. Bihin*, 17 Abb. (N. Y.) Pr. 19; *A. A. C. v. T. C.*, 25 How. (N. Y.) Pr. 482; *Moffat v. Moffat*, 17 Abb. (N. Y.) Pr. 4; *Rogers v. Rogers*, 1 Daly (N. Y.) 194; *Hall v. Hall*, 30 How. (N. Y.) Pr. 51.

<sup>2</sup> *Weikel v. Probasco*, 7 Ind. 690; *Tacket v. May*, 3 Dana (Ky.) 79; *Kelley v. Proctor*, 41 N. H. 139; *Breed v. Gove*, Id. 452; *Manchester v. Manchester*, 24 Vt. 649; *Seargent v. Seward*, 31 Vt. 509.

<sup>3</sup> *Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Bank of Alexandria v. Mandeville*, 1 Cranch, C. Ct. 575; *Pryor v. Ryburn*, 16 Ark. 671; *Griffin v. Brown*, 2 Pick. (Mass.) 304; *Vandiver v. Glaspy*, 7 Rich. (S. C.) 14; *Larrabee v. Wood*, 54 Vt. 452.

<sup>4</sup> *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48; *Bird v. Davis*, 14 N. J. Eq. (1 McCart.) 467; *Cull v. Herwig*, 18 La. Ann. 315; *Stewart v. Stewart*, 7 Johns. (N. Y.) Ch. 229; *Osborn v. Black, Spears* (S. C.) Ch. 431.



of civil society, which was intended to guard the security and confidence of private life, and prevent discords in families, even at the risk of an occasional failure of justice.<sup>1</sup> The rule was an inflexible one, and from it no evasion was permitted.<sup>2</sup> This common-law rule also prevailed in equity,<sup>3</sup> and even the death of one of the parties to the marriage,<sup>4</sup> or its dissolution by divorce or judicial annulment did not operate to relax it.<sup>5</sup>

§ 155. **Scope and Extent of the Rule.** — The rule was applied to exclude the wife where, though not the nominal party, the husband was the beneficial plaintiff in the suit.<sup>6</sup> If his interests were directly involved so as to be concluded by any verdict or judgment in the case, she could not testify.<sup>7</sup> Direct interest of either spouse, in the result of the litigation, totally disqualified the other as a witness.<sup>8</sup> So, though the husband was not a party, the wife could not testify to any matter for which he might be indicted;<sup>9</sup> and the wife of one of two or more co-defendants was an incompetent witness, either for or against the other defendants who joined with her husband in the defence,<sup>10</sup> even after her husband had suffered a default to be taken against him.<sup>11</sup>

In applying these principles, it has been held that a witness whose wife had funds invested in the business of the plaintiff copartnership was incompetent as a witness,<sup>12</sup> as was a witness whose wife was a stockholder in the bank which brought the suit;<sup>13</sup> and another, the trustee of his wife's property being a party, was not permitted to testify for the

<sup>1</sup> O'Connor v. Majoribanks, 4 M. & G. 443; Stein v. Bowman, 13 Pet. (U. S.) 223; Davis v. Dinwoody, 4 T. R. 678; Bentley v. Cooke, 3 Doug. 422.

<sup>2</sup> Tulley v. Alexander, 11 La. Ann. 628; Kemp v. Downham, 5 Harr. (Del.) 417; Waddams v. Humphrey, 22 Ill. 661; Bradford v. Williams, 2 Md. Ch. 1; Kimbrough v. Mitchell, 1 Head (Tenn.) 539. And see Peaslee v. McLoon, 16 Gray (Mass.) 488, where the English cases are reviewed.

<sup>3</sup> Vowles v. Young, 13 Ves. 144.

<sup>4</sup> *Infra*, §§ 164, 165.

<sup>5</sup> *Infra*, § 166.

<sup>6</sup> Pyle v. Maulding, 7 J. J. Marsh. (Ky.) 202; Farrell v. Ledwell, 21 Wis. 182; Joice v. Branson, 73 Mo. 28.

<sup>7</sup> Young v. Gilman, 46 N. H. 484; Brown v. Burrington, 36 Vt. 40; Pringle v. Pringle, 59 Pa. St. 281; Larabee v. Wood, 54 Vt. 452; Lewis v. McDougall, 17 Wis. 517.

<sup>8</sup> Wheeler v. Wheeler, 47 Vt. 637; Bierly's Estate, 81\* Pa. St. 419.

<sup>9</sup> Den. v. Johnson, 3 Harr. (N. J.) 87.

<sup>10</sup> 1 Hale, P. C. 301; Rex v. Hood, 1 Moo. C. C. 281; Tomlinson v. Lynch, 32 Mo. 160; Craig v. Kittredge, 20 N. H. 169.

<sup>11</sup> Sparhawk v. Buell, 9 Vt. 41.

<sup>12</sup> Jackson v. Miller, 1 Dutch. (N. J.) 90.

<sup>13</sup> Routh v. Agricultural Bank, 12 Sm. & M. (Miss.) 161.

trustee, although he had no interest in the subject-matter of the trust.<sup>1</sup> So the husband was not permitted to testify in support of a nuncupative will claimed to have been made in favor of his wife;<sup>2</sup> or to prove a marriage contract in her favor.<sup>3</sup>

The wife of a special bail was an incompetent witness for the principal defendant.<sup>4</sup> She could not prove the fact of her husband's bankruptcy.<sup>5</sup> And neither could testify, in a proceeding to which they were parties, to enforce a mechanics' lien against their property.<sup>6</sup>

But this common-law rule has been greatly relaxed in many jurisdictions, and almost totally abrogated in others. The various statutory provisions effect quite different results in the several States,<sup>7</sup> some of them placing the admissibility of the testimony of husband and wife upon the same plane as that of persons in no way related one to another (except as to confidential communications between them),<sup>8</sup> and others only partially, and more hesitatingly obliterating the safeguards built up around the marriage relation by the common law. In one respect, however, there seems to be considerable unanimity among the decisions interpreting the so-called "enabling acts," *i.e.*, it is pretty well settled by the weight of authority, that the removal, by these statutes, of the disqualification of interest in the event, as a party or otherwise, does not remove the common-law inhibition as to the testimony of husband or wife for or against the other, the common-law rule not being founded upon the interest of the witness, but upon grounds of public policy.<sup>9</sup> Another rule of construc-

<sup>1</sup> *Burrell v. Bull*, 3 Sandf. (N. Y.) Ch. 15; *Hasbrouck v. Vandervoort*, 9 N. Y. 153.

<sup>2</sup> *Jones v. Norton*, 10 Tex. 120.

<sup>3</sup> *McDuffie v. Greenway*, 24 Tex. 625.

<sup>4</sup> *Leggett v. Boyd*, 3 Wend. (N. Y.) 376.

<sup>5</sup> *Ex parte James*, 1 P. Wms. 610, 611.

<sup>6</sup> *Briggs v. Titus*, 7 R. I. 441. For further decisions illustrating the application of the rule, see *Gilleland v. Martin*, 3 McLean (U. S.) 490; *Jones v. Bassett*, 27 Ind. 58; *Beard v. Morancy*, 2 La. Ann. 347; *Robbins v. Abrahams*, 1 Halst. (N. J.) Eq. 465; *Petrick v.*

*Ashcroft*, 4 C. E. Gr. (N. J.) 339; *Macondray v. Wardle*, 26 Barb. (N. Y.) 612; *Andrews v. Nelson*, 7 Abb. (N. Y.) Pr. 3, note.

<sup>7</sup> See a compilation of the statutes, *supra*, Chap. VIII.

<sup>8</sup> As to these, see *infra*, § 274.

<sup>9</sup> *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Dawley v. Ayers*, 23 Cal. 108; *Stanley v. Stanton*, 36 Ind. 445; *McKeen v. Frost*, 46 Me. 239; *Kelley v. Drew*, 12 Allen (Mass.) 107; *Gee v. Scott*, 48 Tex. 510; *Cram v. Cram*, 33 Vt. 15; *Re Jones*, 6 Biss. (U. S.) 68 (Wisconsin). To the contrary, *Lockhart v. Luker*, 36 Miss. 68; but compare *Dunlap v. Hearn*, 37 Id. 471.

tion of these statutes is, that the witness is not rendered competent, merely because the husband or wife of the witness is a party, but that the witness himself, or herself, as the case may be, must be a party in order to get the benefit of the statute.<sup>1</sup>

§ 156. **Not Competent against each other.** — It was well settled at common law that neither party to the marriage could testify *against* the other in any action, civil or criminal;<sup>2</sup> even though her husband was unnecessarily made a co-defendant in equity, the wife was not competent for the plaintiff.<sup>3</sup> She could not discredit a joint title in herself and her husband coming to them through her own heirship;<sup>4</sup> nor could she give testimony the tendency of

<sup>1</sup> Barber *v.* Goddard, 9 Gray (Mass.) 71; Ray *v.* Smith, Id. 141; Blake *v.* Lord, 16 Id. 387; White *v.* Stafford, 38 Barb. (N. Y.) 419; Carpenter *v.* Moore, 43 Vt. 392.

In Colorado, the husband may testify where the separate property of the wife is concerned. Hanna *v.* Barker, 6 Colo. 303.

In Illinois, neither husband nor wife can testify for or against the other, except in the cases enumerated in the statute. Phares *v.* Barbour, 49 Ill. 370; Keep *v.* Griggs, 12 Ill. App. 511. See also Warrick *v.* Hull, 102 Ill. 280.

In Indiana, where the husband has no such interest in the issue as would render him competent if suing or being sued alone, he cannot testify. Hollowell *v.* Simonson, 21 Ind. 398. See also Drew *v.* Roberts, 48 Me. 35.

In Iowa, the fact that both are parties does not render the wife competent, but the husband can waive the statutory prohibition. Russ *v.* War Eagle, 14 Iowa, 363. Either may make the waiver. Blake *v.* Graves, 18 Iowa, 312; Jordan *v.* Henderson, 19 Id. 565.

In Massachusetts, both are competent and *compellable* to testify, except on the trial of a criminal proceeding against the other. Pub. Stat. ch. 169, § 18.

In New York, the wife may testify, but if her husband is precluded from being a witness by § 829 of the Code

of Civ. Pro., she is also. Whitehead *v.* Smith, 81 N. Y. 151. See *supra*, § 130.

In West Virginia, the statutes make no material change in the competency of husband or wife, except to allow them to be witnesses for or against each other in suits between themselves. Hill *v.* Proctor, 10 W. Va. 59; Rose *v.* Brown, 11 Id. 122; Anderson *v.* Snyder, 21 Id. 632. Where a husband and wife are parties to a suit in company with others, the husband or wife can in general only testify as to controversies, involved in the suit, in which they alone are materially interested. Zane *v.* Fink, 18 W. Va. 693.

In Wisconsin, husband and wife are competent witnesses for or against each other in three cases only: (1) where both are parties to the action; (2) where one is charged with personal violence upon the other; (3) where one has acted as the agent of the other, as to matters within the scope of such employment, Carney *v.* Gleissner, 59 Wis. 249.

<sup>2</sup> Kyle *v.* Frost, 29 Ind. 382; Carter *v.* Taylor, 20 La. Ann. 421; Blain *v.* Patterson, 47 N. H. 523; Copous *v.* Kauffman, 8 Paige (N. Y.) 583; Erwin *v.* Smaller, 2 Sandf. (N. Y.) 340; Edwards *v.* Pitts, 3 Strobb. (S. C.) 140.

<sup>3</sup> Leach *v.* Shelby, 58 Miss. 681.

<sup>4</sup> Moody *v.* Fulmer, 3 Grant (Pa.) Cas. 17.

which was to discredit her husband.<sup>1</sup> She could not support an action against her husband for the price of her own board,<sup>2</sup> or testify against him in an action against both for the value of labor and materials furnished to herself.<sup>3</sup>

On the other hand, the husband was also forbidden to testify against his wife, even to prove his marriage to her where she sued as a *feme sole*,<sup>4</sup> or to prove that property sought to be replevied from the wife was purchased by him and sold to the plaintiff, in rebuttal of testimony tending to show a gift of the property to the wife.<sup>5</sup>

§ 157. **Or for each other.** — Neither was the husband allowed to testify in favor of the wife, or the wife in favor of the husband, in civil or criminal proceedings. If a female defendant plead coverture, the alleged husband could not prove his marriage with her.<sup>6</sup> The husband could not testify in behalf of the interest of the wife in her separate estate;<sup>7</sup> and this, even though she was not a party to the record.<sup>8</sup> So, on the trial of a right of property, where the claimant was a *feme covert*, her husband was incompetent in her behalf,<sup>9</sup> and the wife was likewise incompetent to testify in the husband's favor under like circumstances.<sup>10</sup>

Again, a husband was not a competent witness to a deed conveying land to the wife, and executed during marriage.<sup>11</sup>

<sup>1</sup> Keaton v. McGwier, 24 Ga. 217. *Contra*, Ware v. State, 6 Vr. (N. J.) 553.

<sup>2</sup> Burlen v. Shannon, 14 Gray (Mass.) 433.

<sup>3</sup> Main v. Stephens, 4 E. D. Smith (N. Y.) 86. S. P., Bast v. Auspach, 1 Leg. Gaz. (Pa.) Rep. 25.

<sup>4</sup> Bently v. Cook, 3 Dougl. 442.

<sup>5</sup> Stanley v. Schultz, 47 Ind. 217. Compare Davis v. Dinwoody, 4 T. R. 678.

For statutory modifications of this rule in *civil cases*, see Albaugh v. James, 29 Ind. 398; Lowe v. Hughes, Id. 399; Crane v. Buchannan, Id. 570; Leonard v. Green, 30 Minn. 496; Rowley v. McHugh, 66 Pa. St. 269; Ballentine v. White, 77 Pa. St. 20; Edwards v. Dismukes, 53 Tex. 605.

How the rule is applied in *criminal cases*, see *infra*, § 170.

<sup>6</sup> Woodgate v. Potts, 2 Car. & K. 457. This was held otherwise in *criminal cases*, see *infra*, § 170.

<sup>7</sup> Miller v. Williamson, 5 Md. 219; Wilson v. Sheppard, 28 Ala. 623; Dwelly v. Dwelly, 46 Me. 377; Williamson v. Morton, 2 Md. Ch. 94; Marsman v. Conklin, 2 C. E. Gr. (N. J.) 282; Cramer v. Reford, Id. 367; Galway v. Fullerton, Id. 389; Warner v. Dyett, 2 Edw. (N. Y.) 497.

<sup>8</sup> Cobb v. Edmondson, 30 Ga. 30; Harrell v. Hammond, 25 Ill. 104.

<sup>9</sup> Moore v. McKie, 5 Sm. & M. (Miss.) 238. S. P., Wall v. Nelson, 3 Litt. (Ky.) 395; Caperton v. Callison, 1 J. J. Marsh. (Ky.) 397; Hopkins v. Smith, 7 Id. 263; Hodges v. Branch Bank at Montgomery, 13 Ala. 455; Gross v. Reddig, 45 Pa. St. 406. So, where the claimant was a trustee for the wife. Hall v. Dargan, 4 Ala. 696. S. P., Wier v. Buford, 8 Ala. 134.

<sup>10</sup> Dexter v. Parkins, 22 Ill. 143.

<sup>11</sup> Johnston v. Slater, 11 Gratt. (Va.) 321.

He could not testify for her even though he had no personal interest whatever in the result of the suit.<sup>1</sup> Where the wife was a distributee and would gain by setting aside the will, the husband could not testify for the contestant;<sup>2</sup> nor could he in such a case, there being no will, testify for the administrator in an action against him,<sup>3</sup> or in an action brought by the administrator to increase the assets of the estate.<sup>4</sup> Even where the wife sued to recover damages sustained by her from the intoxication of her husband, caused by the use of liquor sold to him by the defendant, he could not testify in her behalf.<sup>5</sup>

The wife was equally debarred from aiding her husband's cause. Both her testimony and her declarations were inadmissible in his behalf.<sup>6</sup> She could not sustain a title granted by her husband by deed of general warranty;<sup>7</sup> or aid him in resisting an attachment suit,<sup>8</sup> or in maintaining trespass *de bonis asportatis*.<sup>9</sup> She could not, by her declarations made soon after the birth of her child, that it was born alive, support her husband's claim to an estate by the curtesy.<sup>10</sup> Her testimony was inadmissible even where he had only a contingent interest in the result of the suit favorable to the party for whom her testimony was offered; *e.g.*, when the husband's fees as attorney depended upon it.<sup>11</sup> The only case in which she could testify in favor of her husband was where she had acted in the matter in controversy as his agent, and within the scope of her authority as such agent.<sup>12</sup>

<sup>1</sup> *Hosack v. Rogers*, 8 Paige (N. Y) 229.

<sup>2</sup> *Walker v. Walker*, 34 Ala. 469.

<sup>3</sup> *Gilkey v. Peeler*, 22 Tex. 663.

<sup>4</sup> *Lisman v. Early*, 12 Cal. 282.

<sup>5</sup> *Jackson v. Reeves*, 53 Ind. 231. *Contra* in Illinois, *Noy v. Creed*, 1 Ill. App. 557.

<sup>6</sup> *Karney v. Paisley*, 13 Iowa, 89.

<sup>7</sup> *Leach v. Fowler*, 22 Ark. 143.

<sup>8</sup> *McCollem v. White*, 23 Ind. 43; *Boyle v. Haughey*, 10 Phil. (Pa.) 98.

<sup>9</sup> *Hayes v. Parmalee*, 79 Ill. 563.

<sup>10</sup> *Gardner v. Klutts*, 8 Jones (N. C.) L. 375.

<sup>11</sup> *Whitehead v. Foley*, 28 Tex. 268.

<sup>12</sup> *Hardy v. Mathews*, 42 Mo. 406; *Mountain v. Fisher*, 22 Wis. 93. See *infra*, § 162.

The statutory departures from these principles are numerous. Thus, it is now held in some jurisdictions that the husband or wife may testify in favor of the other, when the latter is unnecessarily made a party, *Green v. Taylor*, 3 Hughes (U. S.) 400; or where both are co-plaintiffs or co-defendants, *Marsh v. Potter*, 30 Barb. (N. Y.) 506. Another rule is, to admit either to testify in his or her own behalf only, *Rogers v. Rogers*, 46 Ind. 1; or in behalf of the other who is interested but not a party to the record, *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273.

*The husband* is held competent to testify in support of the wife's claim

§ 158. **Or to prove Non-access.** — The common-law rule, founded on decency, morality, and public policy, provides that neither the husband nor the wife, at any time during the continuance of the marriage, or after its determination by death or divorce, shall be allowed to prove non-access during wedlock, *i.e.*, the absence of the fact of sexual intercourse, or of the opportunity of sexual intercourse, whatever may be the form of the legal proceeding in which such testimony is offered, or whoever may be the parties to it.<sup>1</sup> And the enabling acts do not seem to have changed the rule.<sup>2</sup> Under it, collateral facts could not be shown for the purpose of proving non-access: thus, the husband could not be asked whether, at a particular time, he did not live at a distance from his wife and cohabit with another woman.<sup>3</sup> Neither

to property, *Porter v. Allen*, 54 Ga. 623; *Wing v. Goodman*, 75 Ill. 159; *Allen v. Russell*, 78 Ky. 105; or where the action affects her separate property only, *Snell v. Bray*, 56 Wis. 156; or is brought to recover for services rendered by her. *Fowle v. Tidd*, 15 Gray (Mass.) 94.

*The wife* is competent for her husband (defendant in execution) on a trial of the right of property, *Hemp-hill v. Townsend*, 7 Ala. 853; or, generally, under the Connecticut statute, *Merriam v. Hartford &c. R. R. Co.*, 20 Conn. 354; *contra*, in North Carolina, *Rice v. Keith*, 63 N. C. 319; *e.g.*, to corroborate her husband, *Lincoln Ave. &c. Road Co. v. Madans*, 102 Ill. 417; the jury to give her testimony "such credit as under the circumstances they think it entitled to," *State v. Nash*, 10 Iowa, 81. She may testify for him when sued by an administrator, she not being a party to the record, *Thompson v. Wadleigh*, 48 Me. 66; or when sued in trespass, for breaking and entering and setting fire to plaintiff's barn, *Bucknam v. Perkins*, 55 Me. 490. She may aid him in establishing a claim against the estate of a deceased person, *Barry v. Sturdivant*, 53 Miss. 490; or testify in favor of his assignee, *Prince v. Down*, 2 E. D. Smith (N. Y.) 525; *Farley v. Flanagan*, 1 Id. 313. In Pennsylvania, she may testify for,

but not against, him, *Yeager v. Weaver*, 64 Pa. St. 425. Compare *Dellinger's Appeal*, 71 Id. 425.

In Wisconsin, the rule is that where two or more defendants must rely upon the same defence, so that proof of a good defence as to one establishes a defence as to the other, the wife of one cannot be a witness in behalf of the other, unless the circumstances are such as will permit her to testify directly for her husband. Accordingly, where the issue was whether a conveyance, under which both defendants claimed as grantees, was ever delivered to them by the grantor, it was held that the wife of one defendant (not being herself a party), could not testify for the other. *Stewart v. Stewart*, 41 Wis. 624.

In an early case in Massachusetts, the suit being on a note given to the wife before marriage, and indorsed subsequently by her husband, it was held that the wife could testify that the note was paid before the indorsement. *Fitch v. Hill*, 11 Mass. 286.

<sup>1</sup> *R. v. Rook*, 1 Wils. 340; *R. v. Luffe*, 8 East, 193, 203; *R. v. Kea*, 11 Id. 132; *Goodright v. Moss*, Cowp. 494; *Cope v. Cope*, 1 M. & Rob. 269, 274.

<sup>2</sup> *Chamberlain v. People*, 23 N. Y. 85; *Boykin v. Boykin*, 70 N. C. 262.

<sup>3</sup> *R. v. Stourton*, 5 Ad. & E. 170.

party to the marriage could prove, directly, the illegitimacy of a child born during wedlock.<sup>1</sup> The mother of a child begotten before marriage, but born after, could not testify that her husband was not its father.<sup>2</sup>

When the controversy is between third persons, there are cases which hold the husband and wife competent to testify as to the time of their marriage, the fact of access, the date of the birth of a child, and any other independent facts affecting the question of legitimacy;<sup>3</sup> but in these cases, for the most part, the evidence was admitted *ex necessitate*.<sup>4</sup>

§ 159. **Proving the Marriage—its Duration Immaterial.**—(1) *Proving the marriage*.<sup>5</sup> Sometimes where the competency of a witness is questioned on the ground of marriage to a party or person interested, the *factum* of the marriage is disputed, and such marriage must be proved, to exclude the witness, or disproved, to admit him. The presumption arising from cohabitation is not enough to exclude the witness;<sup>6</sup> although presumptive proof of the marriage has been considered sufficient to render the wife an incompetent witness against the husband to disprove the marriage.<sup>7</sup>

Generally, the husband or wife is competent to prove the marriage so as to render the other an incompetent witness,<sup>8</sup> or to sustain the objection that the plaintiff was a married

<sup>1</sup> *R. v. Mansfield*, 1 Q. B. 444. But in *R. v. Stourton*, *supra*, Patterson, J., said that the parents could bastardize their issue by any evidence except that of non-access. So, also, it is held that the wife may testify to her own adultery and name her paramour. While she is not permitted to bastardize her own offspring, still the child's illegitimacy having been shown by proper evidence, she is sometimes, from necessity, permitted to testify as to who is the father of the child. *Ratcliff v. Wales*, 1 Hill (N. Y.) 63, 65; *People v. Overseers of Ontario*, 15 Barb. (N. Y.) 286; *Parker v. Way*, 15 N. H. 45; *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 283; *State v. Pettaway*, 3 Hawks (N. C.) 623; *R. v. Reading*, *Cas. t. Hardw.* 79, 82; *R. v. Luffe*, 8 East, 193.

<sup>2</sup> *Dennison v. Page*, 29 Pa. St. 420; *R. v. Mansfield*, 1 Q. B. 444. But that she can testify in favor of legiti-

macy, see *Mosely v. Eakin*, 15 Rich. (S. C.) 324. For an early English case contrary to the doctrine stated in the text, see *Cooker v. Lloyd*, Peake, Ev. App. xxviii.

<sup>3</sup> *Standen v. Standen*, Peake's Cas. 32; *R. v. Bramley*, 6 T. R. 330; *Parker v. Way*, 15 N. H. 45; *Corson v. Corson*, 44 N. H. 587; *Page v. Dennison*, 1 Grant (Pa.) Cas. 377; *Leaphart v. Leaphart*, 1 So. Car. 199.

<sup>4</sup> See also *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Shaaak's Estate*, 4 Brews. (Pa.) 305.

<sup>5</sup> Most of the authorities on this topic will be found cited *infra*, § 170, where the competency of husband and wife in criminal cases is treated.

<sup>6</sup> *Hill v. State*, 41 Ga. 484.

<sup>7</sup> *Scherpf v. Szadeczky*, 4 E. D. Smith (N. Y.) 110; *Rose v. Niles*, 1 Abb. Adm. 411.

<sup>8</sup> *Dixon v. People*, 18 Mich. 84.

woman suing without her husband or any next friend.<sup>1</sup> So, also, the wife is a competent witness, in behalf of her children, to prove the marriage between herself and her husband.<sup>2</sup> But a woman who claimed to be the widow of an intestate, and as such entitled to letters on his estate, was held incompetent to establish the *factum* of her marriage with the deceased.<sup>3</sup> Otherwise held, where the legality of her marriage with the deceased was the only question in issue.<sup>4</sup>

The marriage must be a lawful one to exclude the parties to it. Lover and mistress are not incompetent witnesses by reason of the fact of their immoral cohabitation.<sup>5</sup> Where the validity of the marriage is in doubt, the witness is generally rejected.<sup>6</sup> The fact that the parties, in good faith, believe their marriage to be valid, does not make it so; and its invalidity being shown, each becomes a competent witness for all purposes, even the disclosure of facts communicated by one to the other during the period they lived together honestly supposing their relation to be that of husband and wife.<sup>7</sup>

(2) *Its duration immaterial.* At what period the marital relation had its inception is of no importance on the question of the competency of either party to that relation as a witness for or against the other. Where one party married a witness already subpœnaed by his opponent to testify on the approaching trial, she was excluded.<sup>8</sup> Nor does it matter that the relation has been ended by death,<sup>9</sup> or judicial decree.<sup>10</sup>

<sup>1</sup> Willis v. Underhill, 6 How. (N. Y.) Pr. 396. *Contra*, Bentley v. Cook, 3 Doug. 442.

<sup>2</sup> Christy v. Clarke, 45 Barb. (N. Y.) 529.

<sup>3</sup> Redgrave v. Redgrave, 38 Md. 93. Compare Fitzsimmons v. Southwick, 38 Vt. 509.

<sup>4</sup> Greenawalt v. McEnelley, 85 Pa. St. 352.

<sup>5</sup> Batthweys v. Galindo, 4 Bing. 610; Flanagan v. State, 25 Ark. 92; Dennis v. Crittenden, 42 N. Y. 542.

<sup>6</sup> Peat's Case, 2 Lew. C. C. 288; Wakefield's Case, Id. 279; Campbell v. Tremlow, 1 Price, 81, 88, 90, 91. See also Divoll v. Leadbetter, 4 Pick. (Mass.) 220.

<sup>7</sup> Wells v. Fletcher, 2 Car. & P. 12; Wells v. Fisher, 1 M. & Rob. 99, and

note. In Utah, the statute excludes the wife, except where the action is between herself and her husband. A witness was offered by a party to the suit on trial with the statement that "she is his plural, or second wife." It was held that such witness should be excluded, and the court would not try the question of the validity of the marriage, or the relations of the parties. Friel v. Wood, 1 Utah T. 160. But compare Miles v. United States, 103 U. S. 304; s. c., 2 Crim. L. Mag. 489; reversing, 2 Utah T. 19.

<sup>8</sup> Pedley v. Wellesley, 3 Car. & P. 558.

<sup>9</sup> Stein v. Bowman, 13 Pet. (U. S.) 209. See *infra*, §§ 164, 165.

<sup>10</sup> See *infra*, § 166.



In such an event, the Supreme Court of the United States has said, "It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule."<sup>1</sup>

§ 160. **Limits and Exceptions to the Rule.**—The rule we are examining, like all other general regulations of the common law, is subject to numerous exceptions, so called, most of them, however, being more seeming than real. Bearing in mind the object of the rule, — to secure the confidence of private life and prevent discords in families, — and that it only forbade the parties to the marriage to enter the witness-box for the purpose of testifying for or against one another, we readily see that in cases where one of the parties to the marriage was a competent witness at common law, the other was also competent. And so it was held.<sup>2</sup> Again, where the wife had no interest in the suit, the husband was admitted as a witness, and *vice versa*.<sup>3</sup> Thus, where a complaint shows the cause of action to be wholly in the husband, he is a competent witness in his own behalf, although the wife may be joined as a plaintiff.<sup>4</sup> And in some cases one spouse was deemed competent where the other was not made a party, and for that reason.<sup>5</sup> In one case found, the admission of the husband's testimony, against the objection of the wife, was held not to be error, because "he testified to nothing untrue or prejudicial to her interest."<sup>6</sup> The fact that his testimony tends to increase a fund held in trust for his wife, will not exclude him, his interest being contingent.<sup>7</sup>

<sup>1</sup> McLean, J., in *Stein v. Bowman*, *supra*. See also *Patton v. Wilson*, 2 Lea (Tenn.) 101. Even where the cause of action accrued to the wife before marriage, the husband was rejected as a witness. *Collins v. Mack*, 31 Ark. 684. *Contra*, *Perry v. Whitney*, 30 Vt. 390. Nor could the wife testify in such cases, the husband being a party. *Smith v. Boston &c. R. R.*, 44 N. H. 334; *Donnelly v. Smith*, 7 R. I. 12. Marriages between slaves, having been declared lawful in Alabama, are within the rule. Ala. Pamph. Acts 175, Ord. No. 23, § 1; *Hampton v. State*, 45 Ala. 82.

<sup>2</sup> *Wixson v. People*, 5 Park. (N. Y.) 119; *Seigling v. Main*, 1 McMull. (S. C.) 252; *Abbott v. Clark*, 19 Vt. 444.

But the wife may be competent where the husband is not, *e.g.*, where he has been convicted of felony or perjury. *State v. Anthony*, 1 McCord (S. C.) 285.

<sup>3</sup> *Meni v. Rathbone*, 21 Ind. 454; *Howell v. Zerbe*, 26 Ind. 214; *Mitchell v. Claggett*, 9 Md. 42; *Hall v. Murphy*, 14 Tex. 637; *Robinson v. Hutchinson*, 31 Vt. 443.

<sup>4</sup> *Lockwood v. Joab*, 27 Ind. 423.

<sup>5</sup> *Deck v. Johnson*, 30 Barb. (N. Y.) 283; *Leavitt v. Bangor*, 41 Me. 458; *Bonett v. Stowell*, 37 Vt. 258.

<sup>6</sup> *Wade v. Powell*, 31 Ga. 1. See also *R. & B. R. R. Co. v. Lincoln*, 29 Vt. 206.

<sup>7</sup> *Dyer v. Homer*, 22 Pick. (Mass.) 253. See also *Sneckner v. Taylor*, 1

Again, the wife can be a witness to testify as to the contents of a lost trunk of her husband;<sup>1</sup> and so may she in a joint suit to recover her separate property;<sup>2</sup> or when jointly defending in respect of such property.<sup>3</sup> Some cases admit the witness because it appears that he or she, as the case may be, has no interest in the event, thus putting as the ground of incompetency interest only.<sup>4</sup> Where the testimony related solely to a defence peculiar to the witness, it was admitted, and the witness allowed to testify in his or her own behalf only, and not in behalf of the other spouse.<sup>5</sup>

§ 161. **Collateral Proceedings.**— While it was an inflexible rule that neither husband nor wife should be permitted to testify against each other, where either was directly and immediately interested in the event of the action or proceeding, whether civil or criminal, yet, in collateral proceedings

Redf. (N. Y.) 427; *Peiffer v. Lytle*, 58 Pa. St. 386; *Rose v. Blair*, 1 Meigs (Tenn.) 525.

<sup>1</sup> *Illinois &c. R. R. Co. v. Taylor*, 24 Ill. 323; *Same v. Copeland*, Id. 332; *Sassen v. Clark*, 37 Ga. 242; *McGill v. Rowand*, 3 Pa. St. 451.

<sup>2</sup> *Gee v. Lewis*, 20 Ind. 149.

<sup>3</sup> *Palmer v. Henderson*, 20 Ind. 297.

<sup>4</sup> *Jackson v. Bard*, 4 Johns. (N. Y.) 230; *Town v. Needham*, 3 Paige (N. Y.) 546.

<sup>5</sup> *Klenk v. Knoble*, 37 Ark. 298; *Call v. Byram*, 37 Ind. 499.

For further decisions in several of the States illustrating these principles and showing various statutory departures from the common-law rule, see the cases listed below in the alphabetic order of the States.

*Illinois.* *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *McNail v. Zeigler*, 68 Ill. 224; *Pigg v. Carroll*, 89 Ill. 205; *Marshall v. Peck*, 91 Ill. 187; *Cordery v. Hughes*, 6 Ill. App. 401; *Pyle v. Oustatt*, 92 Ill. 209. *Indiana.* *McConnell v. Martin*, 52 Ind. 434; *Wood v. Bibbins*, 58 Ind. 392; *Scarry v. Eldridge*, 63 Ind. 44; *Morgan v. Hyatt*, 62 Ind. 560; *Clouse v. Elliott*, 71 Ind. 112. *Iowa.* *Johnson v. Johnson*, 52 Iowa, 586. *Kansas.* *Ruth v. Ford*, 9 Kan. 17; *Furron v. Chapin*, 13 Kan. 107. *Louisiana.* *Boisse v. Dickson*, 31 La. Ann. 741.

*Massachusetts.* *Packard v. Reynolds*, 100 Mass. 153; *Bruce v. Matthews*, 101 Id. 64; *Morony v. O'Laughlin*, 102 Id. 184; *Trafton v. Hawes*, Id. 533; *Baxter v. Boston &c. R. R. Co.*, Id. 383. *Missouri.* *Funk v. Dillon*, 21 Mo. 294; *Fugate v. Pierce*, 49 Mo. 441; *Buck v. Ashbrook*, 51 Mo. 539; *Evers v. Life Assoc. of America*, 59 Mo. 429; *Cooper v. Ord*, 60 Mo. 420; *Quade v. Fisher*, 63 Mo. 325; *Wilcox v. Todd*, 64 Mo. 388; *Steffen v. Bauer*, 70 Mo. 399; *Wood v. Broadley*, 76 Mo. 23. *New York.* *Maverick v. Eighth Ave. R. R. Co.*, 36 N. Y. 378; *Babbott v. Thomas*, 31 Barb. 277; *Schaffner v. Reuter*, 37 Id. 44; *Hooper v. Hooper*, 43 Id. 292; *Draper v. Heusingsen*, 16 How. Pr. 281; *Shoemaker v. McKee*, 19 Id. 86; *Matteson v. N. Y. &c. R. R. Co.*, 62 Barb. 364; *Southwick v. Southwick*, 49 N. Y. 510; *Wehrkamp v. Willett*, 4 Abb. App. Dec. 548; *People ex rel. Commr's v. Barthol*, 24 Hun, 272. *Ohio.* *Nuser v. Beach*, 15 Ohio St. 172; *Robinson v. Chadwick*, 22 Id. 527; *Westerman v. Westerman*, 25 Id. 500. *Pennsylvania.* *Musser v. Gardner*, 66 Pa. St. 242. *Tennessee.* *Orr v. Cox*, 3 Lea (Tenn.) 617. *Texas.* *Cameron v. Fay*, 55 Tex. 58. *Virginia.* *Frank v. Lilienfeld*, 33 Gratt. 377; *Hayes v. Va. Mut. Protection Assoc.*, 76 Va. 225.

not immediately affecting their mutual interest, their testimony was receivable, even though the testimony of one tended to contradict the other, or might subject the other to a legal demand, or even to a criminal accusation;<sup>1</sup> but it is the privilege of the witness to decline to testify to such facts as will criminate the other party to the marriage.<sup>2</sup>

§ 162. **Cases of Agency.**—(1) *In general.* Perhaps the most important exception to the rule in question is, that it will not be applied to cases where the wife has acted for the husband in his business, and by his authority and consent; he thereby adopts her acts, and will be bound by any admis-

<sup>1</sup> *Commonwealth v. Reid*, 8 Phil. (Pa.) 385; s. c., 1 Pa. Leg. Gaz. Rep. 182, where the cases are fully discussed. See also B. N. P. 287; *Clubb v. State*, 14 Tex. App. 192.

<sup>2</sup> *Ibid.* In a comparatively early English case the rule was laid down, that a husband or wife ought not to be permitted to give any evidence that may even tend to criminate the other (*King v. Inhab. of Cliviger*, 2 T. R. 263). This rule was much discussed in two subsequent cases in the Court of King's Bench (*King v. Inhab. of All Saints*, 6 Mau. & Sel. 194, and *King v. Inhab. of Bathwick*, 2 Barn. & Ad. 639, 647), the court, after much argument, deciding that the rule must be restricted. Lord Ellenborough remarked that the rule was laid down "somewhat too largely."

In *King v. Bathwick*, where, the question being a female pauper's settlement, a man had been called to prove his marriage to her, another woman was held a competent witness to prove her own previous marriage with the same man; for although, if the testimony of both witnesses were true, the husband had been guilty of bigamy, yet neither the testimony given, nor any decision of the trial court founded on that testimony, could thereafter be received in evidence to support an indictment against him for that crime; it being altogether *res inter alios acta*, and neither the husband nor the wife having any interest in the decision of the question. In the opinion, the

court said that the rule laid down in *King v. Cliviger* "is undoubtedly true in the case of a direct charge and proceeding against him for any offence," but denied its correctness when applied to collateral matters. See also *Fitch v. Hill*, 11 Mass. 286; *Baring v. Reeder*, 1 Hen. & M. (Va.) 154, which decisions are commented on by Chief Justice Parker, of Massachusetts, as follows: "They establish this principle, that the wife may be a witness to excuse a party sued for a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. And the reason is, that the verdict in the action in which she testifies, cannot be used in the action against her husband; so that, although her testimony goes to show that he is chargeable, yet he cannot be prejudiced by it. And it may be observed, that, in these very cases, the husband himself would be a competent witness, if he were willing to testify, for his evidence would be a confession against himself." *Griffin v. Brown*, 2 Pick. (Mass.) 308. See also *Vowles v. Young*, 13 Ves. 144; *Williams v. Johnson*, 1 Str. 504; and *Henman v. Dickinson*, 5 Bing. 183, where, the suit being by indorsee against acceptor, and the defence, fraudulent alteration by drawer after acceptance, the wife of the drawer was allowed to prove such alteration.

For the application of this rule in criminal cases, see *infra*, § 170.

sion or acknowledgment made by her respecting that business, and her testimony will be admissible touching anything she did as his agent, within the scope of her delegated authority.<sup>1</sup>

(2) *Wife competent.* The English rule was narrower than the one just stated: the admissions and declarations of the wife were admitted, and so far she was treated like any other agent; but she could not be called as a witness, while an ordinary agent could be.<sup>2</sup> This distinction does not seem to have met with favor in this country, except, perhaps, in Arkansas.<sup>3</sup> The American rule seems to be that a wife is not a competent witness for her husband, *except* as to matters in which she has acted as his agent; the question whether she so acted in a given transaction (though she is probably a competent witness upon that question) is to be determined by the court before she is admitted to testify in chief; and the proof of her agency should generally be elicited by direct interrogatories on that subject.<sup>4</sup>

During the husband's absence from home, the wife acts as his agent in the care and protection of his property within the home limits, without any express direction or agreement,

<sup>1</sup> *Wheeler & Wilson Mfg. Co. v. Tinsley*, 75 Mo. 458; *Degenhart v. Schmidt*, 7 Mo. App. 117; *Lunay v. Vantyne*, 40 Vt. 501; *Birdsall v. Dunn*, 16 Wis. 235; *Chunot v. Larson*, 43 Wis. 536. There are many cases asserting the admissibility of evidence of the *admissions* of the wife, made out of court, as to her agency, and her acts done under it; but our purpose here is to ascertain her competency as a *witness testifying on the trial* respecting such acts, and the *factum* of her agency. See *Emerson v. Blonadin*, 1 Esp. 142; 1 Str. 527; *B. N. P.* 287; *Anderson v. Saunderson*, Holt, N. P. 591; *White v. Cuyler*, 6 T. R. 176; *Clifford v. Burton*, 1 Bing. 199; *Tenner v. Lewis*, 10 Johns. (N. Y.) 38; *Riley v. Suydam*, 4 Barb. (N. Y.) 222; *Williamson v. Morton*, 2 Md. Ch. 94; *Hughes v. Stokes*, 1 Hayw. (N. C.) 372; *Curtis v. Ingham*, 2 Vt. 289.

<sup>2</sup> 1 Phil. Ev. \*93.

<sup>3</sup> A late case in that State decides that neither husband nor wife can

testify for or against each other in civil cases: not even when either one acts as agent for the other. *Watkins v. Turner*, 34 Ark. 663. Compare *Magness v. Walker*, 26 Ark. 470.

<sup>4</sup> *Chunot v. Larson*, 43 Wis. 536; *Burke v. Savage*, 13 Allen (Mass.) 408, where she was held a competent witness to prove her agency, as well as her acts as agent.

In Illinois, she is placed on the footing of a *feme sole*, so far as respects her competency to testify concerning transactions in which she acted as her husband's agent. *Poppers v. Miller*, 14 Ill. App. 87.

In Indiana, it is held that communications between husband and wife relating to an agency conferred by him upon her are not confidential communications nor inadmissible in evidence. *Schmied v. Frank*, 86 Ind. 250. But the contrary doctrine is maintained in Tennessee. *Washington v. Bedford*, 10 Lea, 243.

and is competent to testify as to what she does in that behalf in any action by or against him.<sup>1</sup> If she keeps his accounts for him, she may testify that she made the entries by his direction and in his presence.<sup>2</sup> Being authorized by him to take care of his property and to notify the insurers in case of loss, she may testify, in an action on the policy, as to facts connected with the loss, and the insurers cannot show by her that he did not hold the legal title to the land, such fact not being within the scope of her agency.<sup>3</sup> Where he is sued for property pledged with her for money loaned, she may testify as to what contract she made with the plaintiff, and that she acted as her husband's agent in making it.<sup>4</sup> If her husband gives her a note to collect, she may prove her acts within the scope of her agency, in her husband's suit against the estate of the deceased maker.<sup>5</sup> Where, through his acts of cruelty, she is compelled to leave his house, she may testify *against* him, when sued for necessities furnished to her, and prove such acts of cruelty; and, in such a case, it is immaterial whether his liability be placed on the ground of her implied agency to contract for the necessities, or on that of his marital duty.<sup>6</sup>

(3) *Wife incompetent.* Ordinarily there must be proof of authority conferred, or ratification by the husband, or the wife will not be a competent witness to establish that a contract entered into by her with a third person, is the contract of her husband made by her as his agent.<sup>7</sup> Nor does the rule generally apply when the husband is sued for a personal tort, such as malicious prosecution, even though she acted as his agent.<sup>8</sup>

Again, where the husband is sued for the price of goods

<sup>1</sup> Fisher v. Conway, 21 Kan. 18; Town v. Lampshire, 37 Vt. 52.

<sup>2</sup> Littlefield v. Rice, 10 Metc. (Mass.) 287.

<sup>3</sup> O'Connor v. Hartford Fire Ins. Co., 31 Wis. 161.

<sup>4</sup> Sumner v. Cooke, 51 Ala. 521.

<sup>5</sup> Engmann v. Immel, 59 Wis. 249.

<sup>6</sup> Bach v. Parmely, 35 Wis. 238.

<sup>7</sup> Orcutt v. Cooke, 37 Vt. 515; Meek v. Pierce, 19 Wis. 300.

<sup>8</sup> Bliss v. Franklin, 13 Allen (Mass.) 244.

In Vermont it is held, that where

the husband is temporarily absent from home for a day, leaving his wife without any special charge or agency, except "such as married women living and keeping house with their husbands would have in such cases," she is not his agent so as to be competent to testify for him as to matters transpiring during his absence. Bates v. Cilley, 47 Vt. 1. With all due respect, the writer submits that, as a general proposition, this is not sound law.

purchased by him in the wife's presence, she assisting in their selection, she is not competent, on the ground of agency, to prove that the goods were furnished on the credit of a third person in payment of the latter's indebtedness to the husband.<sup>1</sup> So, it is held, that merely sending the wife to collect payment for goods sold by the husband does not make her his agent within the rule.<sup>2</sup> And where a wife, being requested by her husband to call into their house the indorser of a note held by the husband, asked the indorser "whether he was going to pay the note," she was held not to be the husband's agent in such a sense as to be competent to testify to admissions made to her by the indorser which would render him liable on the note without presentment, and demand of the maker.<sup>3</sup>

(4) *Husband as agent of wife.* The same principle by the application of which the wife is permitted to testify as to her acts done as the agent of her husband, also admits the husband as a witness for his wife, as to acts done by him as her authorized agent.<sup>4</sup> Thus, he may testify as to what disposition he has made of money belonging to her separate estate.<sup>5</sup> He may show what he did in her absence as well as what he did in her presence;<sup>6</sup> and he may also prove the *factum* of his agency and its extent.<sup>7</sup> But, as in the wife's case, an agency must appear; his action without her knowledge or consent will not constitute him her agent;<sup>8</sup> nor will the fact that he went with her when she made the bargain, and afterwards, "about the matter of pay," without more, have that effect.<sup>9</sup>

§ 163. **Effect of Consent, or Release of Interest.**—(1) *Consent.* Upon the effect of the husband's consent that the wife be admitted as a witness against him, the authorities are not in harmony. Some of them take the ground that it is only the *interest* of the husband which excludes her, and inasmuch as an interested witness is competent to testify against his interest, provided he consents to do so,<sup>10</sup> the wife may be

<sup>1</sup> Trepp v. Barker, 78 Ill. 146.

<sup>2</sup> Robertson v. Brost, 83 Ill. 116.

<sup>3</sup> Hale v. Danforth, 40 Wis. 382.

<sup>4</sup> Hobby v. Wisconsin Bank, 17 Wis. 167; Haerle v. Kreihn, 65 Mo. 202; Chesley v. Chesley, 54 Mo. 347.

<sup>5</sup> Robison v. Robison, 44 Ala. 227.

<sup>6</sup> Menk v. Steinfert, 39 Wis. 370.

<sup>7</sup> Owen v. Cawley, 36 Barb. (N. Y.) 52. See also Arndt v. Harshaw, 53 Wis. 269.

<sup>8</sup> Case v. Colter, 66 Ind. 336.

<sup>9</sup> Waggonseiler v. Rexford, 2 Ill. App. 455.

<sup>10</sup> *Supra*, § 50.

properly admitted to testify against her husband's interest, he consenting that she do so.<sup>1</sup>

But the better opinion seems to favor her exclusion as a witness against her husband, even though he consents; for the reason that the interest of the husband in preserving the confidence placed in her is not the only ground of the rule. The preservation of domestic tranquillity, and the diminution of temptations to commit perjury, are objects in which society at large is interested, and to admit her as a witness under such circumstance would be opposed to a sound public policy.<sup>2</sup>

(2) *Release of interest.* Clinging to the mistaken idea that individual interest, and not public policy, afforded the ground of the rule, several highly respectable courts have held that a conveyance by husband and wife to the wife,<sup>3</sup> or by the husband to the wife,<sup>4</sup> or by both to their children,<sup>5</sup> of all their interest in the issue on trial, rendered them, or the one making such transfer, competent to testify in the cause, notwithstanding the existence of the marital relation. So, also, it has been decided, and with a better reason, that the wife of a sole executor of a will, who has renounced, is competent to prove its execution as a will of real estate;<sup>6</sup> that the wife of one of several co-defendants in foreclosure, who suffers the bill to be taken *pro confesso* as against her, thereby becomes competent for the other defendants;<sup>7</sup> that where the payee of a note indorses it to a third person, taking a release from liability thereon, his wife becomes competent for the holder;<sup>8</sup> and that a wife, in the absence of her husband, who has been released from liability in the suit, is a competent witness therein.<sup>9</sup> But it is difficult to perceive how these adjudica-

<sup>1</sup> *Pedley v. Wellesley*, 3 Car. & P. 558.

<sup>2</sup> See *Barker v. Dixey*, *Cas. t. Hardw.* 204; *Sedgwick v. Watkins*, 1 Ves. Jr. 49; *Randall's Case*, 5 City H. Rec. (N. Y.) 141, 153, 154; *Davis v. Dinwoody*, 4 T. R. 679.

In California it is held, that if a wife examines her husband as a witness in her own behalf, she thereby waives her right to object to his examination by the adverse party, upon any of the issues in the action. *Steinberg v. Meany*, 53 Cal. 425.

<sup>3</sup> *Meredith v. Hughes*, 28 Ga. 571.

<sup>4</sup> *Weems v. Weems*, 19 Md. 334.

<sup>5</sup> *Meredith v. Hughes*, *supra*. *Contra*, *Locke v. Noland*, 11 Ala. 249.

<sup>6</sup> *Daniel v. Proctor*, 1 Dev. (N. C.) L. 428. But compare *Huic v. O'Connell*, 2 Jones (N. C.) L. 455.

<sup>7</sup> *Hadley v. Chapin*, 11 Paige (N. Y.) 245.

<sup>8</sup> *Bisbing v. Graham*, 14 Pa. St. 14; *Armstrong v. Noble*, 55 Vt. 428.

<sup>9</sup> *Peaceable v. Keep*, 1 Yeates (Pa.) 570. See also *Borneman v. Sidlinger*, 21 Me. 185; *Thomas v. Catheral*, 5 Gill & J. (Md.) 23.

tions can be upheld under the well-settled construction of the common-law rule, *i.e.*, that its foundation is in public policy, and not private, individual interest.

§ 164. **Surviving Husband.** — While, as we have seen, the dissolution of the marriage relation by the death of one of the parties has not the effect of removing the incompetency of the other to disclose matters protected by the rule excluding husband and wife as witnesses for or against each other;<sup>1</sup> yet one having died, the other is competent as to anything the knowledge of which was not obtained through the privacy of the marriage relation.<sup>2</sup> But the husband cannot testify to conversations between himself and his deceased wife;<sup>3</sup> or against the interests of her estate.<sup>4</sup>

§ 165. **Widow.** — So, also, the widow is a competent witness as to matters in which her deceased husband was interested, unless she acquired her knowledge of the facts through confidential communications from him;<sup>5</sup> in which latter case she is incompetent.<sup>6</sup> She may testify as to a conversation in her presence, or overheard by her, between her husband and a third person.<sup>7</sup> She may prove her husband's acts, not affecting his character,<sup>8</sup> or such of his business transactions as were observed by her during his life, or came to her knowledge through sources other than communications by him to her.<sup>9</sup>

<sup>1</sup> *Supra*, § 154.

<sup>2</sup> *Wooley v. Turner*, 13 Ind. 253; *Haugh v. Blythe*, 20 Ind. 24; *Elswick v. Com.*, 13 Bush (Ky.) 155; *English v. Cropper*, 8 Id. 292.

<sup>3</sup> *Dye v. Davis*, 65 Ind. 474.

<sup>4</sup> *Succession of Wade*, 21 La. Ann. 343. But see *Reilly v. Succession of Reilly*, 28 Id. 609; *Ames' Succession*, 33 Id. 1317, which two cases seem to lean the other way. See also *Wood v. Broillar*, 40 Iowa, 591.

In New York, it was held that a tenant by the curtesy was competent for the plaintiff in an action of ejectment by the heir at law. *Jackson v. Brooks*, 8 Wend. (N. Y.) 426. In Maryland, that a second husband, surviving his wife, who was administratrix of the first husband, was competent for her surety in an action on the administration bond. *Wallis v. Britton*,

1 Har. & J. (Md.) 478. See also, generally, *Ayres v. Ayres*, 11 Gray (Mass.) 130; *William & Mary College v. Powell*, 12 Gratt. (Va.) 372.

<sup>5</sup> *Ryan v. Follansbee*, 47 N. H. 100; *Jackson v. Barron*, 37 Id. 494; *Cornell v. Vanartsdalen*, 4 Pa. St. 364.

<sup>6</sup> *Lingo v. State*, 29 Ga. 470; *Gray v. Cole*, 5 Harr. (Del.) 418.

<sup>7</sup> *Pratt v. Delaware*, 17 Iowa, 307; *Stuhlmuller v. Ewing*, 39 Miss. 447; *Mercer v. Patterson*, 41 Ind. 440; *Griffin v. Smith*, 45 Ind. 366; *Floyd v. Miller*, 61 Ind. 224.

<sup>8</sup> *M'Guire v. Maloney*, 1 B. Mon. (Ky.) 224. *S. P.*, *Stober v. McCarter*, 4 Ohio St. 513; *White v. Perry*, 14 W. Va. 66.

<sup>9</sup> *Spivey v. Platon*, 29 Ark. 603; *Powell v. Powell* (Ill.), 2 N. E. Rep. 162; *Short v. Tinsley*, 1 Metc. (Ky.) 397; *Stein v. Weidman*, 20 Mo. 17;



Thus, she may testify as to the execution, loss, and contents of a bond given to her husband;<sup>1</sup> or that goods were received by the executor for which he has not accounted;<sup>2</sup> or that a deed of conveyance in which she joined with her husband was only intended to operate as a mortgage;<sup>3</sup> or that such a deed, so executed by her, was not fraudulent under the statute of 13 Elizabeth;<sup>4</sup> or that a parol gift, claimed to have been made by her husband, was, in fact, a loan;<sup>5</sup> or that a pretended purchase from him was never consummated.<sup>6</sup> She is also a competent witness in an action against her husband's administrator, for her board.<sup>7</sup> She is competent for the executors when she has no interest in the result of the case.<sup>8</sup>

Where the litigation concerns the real estate of her deceased husband, she is not a competent witness where the result can either increase or reduce her dower;<sup>9</sup> but if, in such a case, she is not entitled to dower,<sup>10</sup> or has released her right,<sup>11</sup> or received her dower by consent of the heirs,<sup>12</sup> she is competent.

Gaskill v. King, 12 Ired. (N. C.) L. 211; Robb's Appeal, 98 Pa. St. 501; White v. Perry, *supra*. Compare Barker v. McAuley, 4 Heisk. (Tenn.) 424.

<sup>1</sup> Carpenter v. Dame, 10 Ind. 125.

<sup>2</sup> Sherwood v. Hill, 25 Mo. 391.

<sup>3</sup> Price c. Joyner, 3 Hawks (N. C.) 418. *Contra*, Eckford v. Dekay, 6 Paige (N. Y.) 565.

<sup>4</sup> Chambers v. Spencer, 5 Watts (Pa.) 404.

<sup>5</sup> Hay v. Hay, 3 Rich. (S. C.) Eq. 384.

<sup>6</sup> Keys v. Baldwin, 33 Tex. 666.

<sup>7</sup> Romans v. Hay, 12 Iowa, 270.

<sup>8</sup> Gebhart v. Shindlc, 15 S. & R. (Pa.) 237.

<sup>9</sup> Wade v. Johnson, 5 Humph. (Tenn.) 117. S. P., Chaney v. Moore, 1 Coldw. (Tenn.) 48. But see McCullough v. McCullough, 31 Mo. 226.

<sup>10</sup> Wallingford v. Fiske, 24 Me. 386.

<sup>11</sup> Dobson v. Racey, 8 N. Y. 216; Gayle v. Morrissey, 5 Sneed (Tenn.) 445.

<sup>12</sup> Morris v. Harris, 9 Gill (Md.) 19.

For further decisions illustrating the status of the widow as a witness in actions wherein the estate of her

husband is involved, generally, see Lay v. Lawson, 23 Ala. 377; Seabrook v. Brady, 47 Ga. 650; Peacock v. Albin, 39 Ind. 25; Fitzgerald v. Cox, Id. 84; Spaulding v. Conway, 51 Mo. 51. In actions on *bills and notes*, see Saunders v. Hendrix, 5 Ala. 224; Robinson v. Talmadge, 97 Mass. 171; Payne v. Devinal, 11 Sm. & M. (Miss.) 400. Actions for *price of goods sold*, see Dexter v. Booth, 2 Allen (Mass.) 559. In *will contests*, see Talbot v. Talbot, 23 N. Y. 17; Hester v. Hester, 4 Dev. (N. C.) L. 228; Brewer v. Ferguson, 11 Humph. (Tenn.) 565. Suits to *set aside conveyances*, see Kisling v. Shaw, 33 Cal. 425; Sanborn v. Lang, 41 Md. 107; Witthaus v. Schack, 24 Hun, 328; Bell v. Coiel, 2 Hill (S. C.) Ch. 108. Suits *against husband's estate*, see Powell v. Powell, 10 Ala. 900; Jackson v. Delancy, 4 Cow. (N. Y.) 427. Suits *in favor of husband's estate*, see Johnson v. Worthy, 17 Ga. 420; Lockwood v. Mills, 39 Ill. 602; Deniston v. Hoagland, 67 Ill. 265; Adams v. Adams, 23 Ind. 50; Felch v. Hooper, 20 Me. 159; Walker v. Sanborn, 46 Me. 470; Megary v. Fon-

§ 166. **Divorced Spouse.** — Nor will the dissolution of the marriage relation by judicial decree of divorce or nullity of marriage restrain the operation of the rule we are examining. As was well said by Lord Alvanley, "It never shall be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved."<sup>1</sup> Thus, a wife who has been divorced from her husband continues to be incompetent to testify against him in respect to transactions which took place prior to the divorce and during coverture;<sup>2</sup> or in his favor, in an action by him against a third person for seducing her.<sup>3</sup> She cannot testify to threats made to her by her husband, to compel her signature to a conveyance alleged to be void for duress.<sup>4</sup> Nor is she competent when the proceeding is instituted to set aside the divorce between herself and her deceased husband.<sup>5</sup>

It has been held, however, that she may be permitted, as a witness against the former husband, to prove a communication not confidential, but which it must have been intended by him at the time, that she should make known to the public.<sup>6</sup>

§ 167. **Cases of Personal Injuries.** — Where the ground of action is a personal injury sustained by the wife at the hands of a third person, the authorities are not in entire harmony as to the husband's competency to testify. In Georgia, the wife having been assaulted, the husband was not permitted to testify that she delayed to complain to

tis, 5 Sandf. (N. Y.) 376. *Ejectment suits*, see *Brindle v. M'Ilvaine*, 10 S. & R. (Pa.) 282; *Thomas v. Maddan*, 50 Pa. St. 261. *Foreclosure suits*, see *Mester v. Hauser*, 94 Ill. 433; *Day v. Seely*, 17 Vt. 542. *Partition suits*, see *Wiseman v. Wiseman*, 73 Ind. 112. *Suits against husband's surviving partner*, see *Jack v. Russey*, 8 Ind. 180; *Allen v. Blanchard*, 9 Cow. (N. Y.) 631. *Trover suits*, see *Tatum v. Manning*, 9 Ala. 144; *Baxter v. Knowles*, 12 Allen (Mass.) 114. *Suits for dower, or distributive share*, see *Shaffer v. Richardson*, 27 Ind. 122; *Keator v. Dimmick*, 46 Barb. (N. Y.) 158.

<sup>1</sup> *Monroe v. Twistleton, Peake, Ev.*

*App.* lxxxvii (xci); *Aveson v. Lord Kinnaird*, 6 East, 192; *Doker v. Hasler*, Ry. & M. 198.

<sup>2</sup> *Barnes v. Camack*, 1 Barb. (N. Y.) 392; *Cook v. Grange*, 18 Ohio, 526; *Perry v. Randall*, 83 Ind. 143.

<sup>3</sup> *Rea v. Tucker*, 51 Ill. 110. But see *infra*, § 169.

<sup>4</sup> *Anderson v. Anderson*, 9 Kan. 112.

<sup>5</sup> *Fidelity Ins. Co.'s Appeal*, 93 Pa. St. 242; *Peterson v. Peterson*, 13 Phil. (Pa.) 82.

<sup>6</sup> *Crook v. Henry*, 25 Wis. 569. See also *Storms v. Storms*, 3 Bush (Ky.) 77, as to the competency of a divorced husband.

him.<sup>1</sup> In Wisconsin, when both sue for injuries to the person of the wife, caused by the defendant's negligence, the husband is the real party in interest, and may be examined as a witness for plaintiffs, whatever may be the rule as to actions in which he is only a nominal party;<sup>2</sup> and the wife is also competent in such cases tried in the United States circuit court sitting in that State.<sup>3</sup> The rule was the same in Massachusetts, under chapter 188, of the act of 1856.<sup>4</sup> And is the same in Vermont.<sup>5</sup> In New Hampshire, where the husband died after the injury to the wife, but before suit brought, the wife was held a competent witness.<sup>6</sup> And in Vermont, where the wife sued a liquor-dealer, under the "civil damage act," for injuries sustained by reason of the intoxication of her husband, the latter was held a competent witness for the plaintiff.<sup>7</sup>

§ 168. **Actions for Divorce or to annul the Marriage.** — The action being for divorce, the husband has been held competent to prove the wife's desertion of him.<sup>8</sup> So, also, the wife being complainant, she was allowed to testify as to her husband's habits of intoxication and general treatment of her.<sup>9</sup> But the great weight of authority, especially where the ground of divorce is adultery, excludes both parties from testifying, except to sustain the validity of the marriage, to dissolve which the action is brought.<sup>10</sup>

<sup>1</sup> Goodrum v. State, 60 Ga. 509. See also Pillow v. Bushnell, 5 Barb. (N. Y.) 156.

<sup>2</sup> Kaime v. Omro Trustees, 49 Wis. 371; Barnes v. Martin, 15 Wis. 240.

<sup>3</sup> Packet Co. v. Clough, 20 Wall (U. S.) 528.

<sup>4</sup> Snell v. Westport, 9 Gray (Mass.) 321. But see Bunker v. Bennett, 103 Mass. 516, where a contrary rule is laid down under a later statute.

<sup>5</sup> Simkins v. Eddie, 56 Vt. 612.

<sup>6</sup> Winship v. Enfield, 42 N. H. 197.

<sup>7</sup> Acts 1874, No. 27; Snow v. Carpenter, 49 Vt. 426.

As to actions for *malicious prosecution*, see Anderson v. Friend, 71 Ill. 475; Mitchinson v. Cross, 58 Id. 366. Actions for *slander of wife*, see Hawver v. Hawver, 78 Ill. 412; Mousler v. Harding, 33 Ind. 176; Bennifield v. Hypres, 38 Ind. 498; Duval v. Davey,

32 Ohio St. 604. Actions for *malpractice by physician*, see Womack v. McQuarry, 28 Ind. 103.

<sup>8</sup> Stebbins v. Anthony, 5 Col. 348.

<sup>9</sup> Smith v. Smith, 77 Ind. 80; Burdette v. Burdette, 2 Mackey (D. C.) 469.

<sup>10</sup> Such is the law in Louisiana. Dillon v. Dillon, 32 La. Ann. 643; Daspit v. Ehringer, Id. 1174. See also Shantz v. Stoll, 34 Id. 1237; and, until recently, in New Jersey, Marsh v. Marsh, 2 Stew. (N. J.) 396; Dougherty v. Dougherty, 5 Id. 32. See Pamph. Laws, 1881, pp. 16, 24, 69; and in New York, Van Cort v. Van Cort, 4 Edw. 621; Rivenburgh v. Rivenburgh, 47 Barb. (N. Y.) 419; Hennessey v. Hennessey, 58 How. (N. Y.) Pr. 304; Finn v. Finn, 12 Hun (N. Y.) 339; Lincoln v. Lincoln, 6 Robt. (N. Y.) 525. And see Anable v. Anable, 24 How. (N. Y.) Pr. 92. The husband may prove his wife's impo-

Where the proceeding is a collateral one, *e.g.*, where a creditor of the husband sues to annul a judgment of separation of property between the husband and wife, the wife has been held competent to testify.<sup>1</sup>

§ 169. **Actions for Abduction, or Criminal Conversation.** —

(1) *Abduction.* It is held in Minnesota, that even in an action by the husband against one who entices away the wife, where the defence is his ill-treatment of her, the wife cannot be a witness against her husband without his consent;<sup>2</sup> but the contrary was held in New York, in a proceeding to regain the custody of the wife by the writ of *habeas corpus*,<sup>3</sup> and also in Pennsylvania, where her declarations immediately before and at the time of her leaving him, respecting his ill-treatment of her, were admitted in behalf of the defendant charged with enticing her away.<sup>4</sup>

(2) *Criminal conversation.* In these cases the majority of the adjudications exclude the wife from testifying for the plaintiff,<sup>5</sup> unless a divorce has been obtained previous to the trial, when she is competent as to facts occurring after the divorce, in which her husband did not participate,<sup>6</sup> or, according to several highly respectable authorities, even to prove the charge laid in the declaration.<sup>7</sup>

§ 170. **Criminal Actions.** — (1) *In general.* We have already seen that one of the exceptions to the common-law rule excluding husband and wife as witnesses, is, that in collateral proceedings they may testify to facts which even tend to criminate each other.<sup>8</sup> Where, however, a criminal prosecution is instituted against either spouse, the other is generally excluded as a witness either for or against the one on trial,

tence, *it seems*. *Barringer v. Barringer*, 69 N. C. 179; but not her adultery. *Cook v. Cook*, 46 Ga. 308. In Pennsylvania, the parties to the divorce may testify in their own favor, but cannot be compelled to testify against themselves. *Bronson v. Bronson*, 8 Phil. (Pa.) 261. They are excluded in Texas. *Cornish v. Cornish*, 56 Tex. 564, and admitted in Massachusetts, where the proceeding is for a decree of nullity under the statute. Gen. Stat. ch. 107, § 4; *Foss v. Foss*, 12 Allen (Mass.) 26.

<sup>1</sup> *Keller v. Vernon*, 23 La. Ann. 164.

<sup>2</sup> *Huot v. Wise*, 27 Minn. 68.

<sup>3</sup> *People v. Mercein*, 8 Paige (N. Y.) 47.

<sup>4</sup> *Gilchrist v. Bale*, 8 Watts (Pa.) 355.

<sup>5</sup> *Carpenter v. White*, 46 Barb. (N. Y.) 291; *Hicks v. Bradner*, 2 Abb. (N. Y.) App. Dec. 362; *Mathews v. Yerex*, 48 Mich. 361.

<sup>6</sup> *Cross v. Rutledge*, 81 Ill. 266.

<sup>7</sup> *Dickerman v. Graves*, 6 Cush. (Mass.) 308; *Ratcliff v. Wales*, 1 Hill (N. Y.) 63; *Wottrich v. Freeman*, 71 N. Y. 601.

<sup>8</sup> *Supra*, § 161; *Commonwealth v. Reid*, 8 Phil. (Pa.) 385; s. c., 1 Leg. Gaz. Rep. 182, *infra*, subd. 3 and 5 of this section. But see *State v. Wilson*, 2 Vr. (N. J.) 77.

both on grounds of public policy, and in order to lessen the temptation to perjury;<sup>1</sup> and the so-called "enabling acts" have not affected this rule, their operation being, for the most part, confined to civil causes.<sup>2</sup>

Where, however, the cohabitation is meretricious, and not pursuant to a lawful marriage, the rule has no application,<sup>3</sup> and the fact that the alleged martial relation does not exist may be proved by the witness on the *voir dire*.<sup>4</sup> But the converse, it seems, is not true, *i.e.*, where the prosecution has shown an actual marriage between the defendant and one of its female witnesses, *prima facie* valid and in good faith, upon which the defendant might reasonably and honestly rely as valid; and which, upon the trial, he did so rely upon, it is not competent for the prosecution to introduce opposing testimony in order to establish the invalidity of the marriage, so as to make the alleged wife a competent witness against the defendant.<sup>5</sup>

Various statutory modifications of the rule have been made in many of the States; thus, in Kansas the wife of the accused is competent for the State if she voluntarily testifies against her husband; she cannot be compelled to do so.<sup>6</sup> But she may be so compelled in Maine.<sup>7</sup> In New York, she may testify in her husband's favor, but cannot be compelled to be a witness against him. The husband, however, may compel her testimony, and his failure to call her is properly the subject of comment to the jury.<sup>8</sup> In North Carolina and Rhode Island, where the husband is the complainant against one charged with assault, the wife has been held a competent witness in the case, either to support the prosecution or to

<sup>1</sup> *Lucas v. State*, 23 Conn. 18; *William v. State*, 33 Ga. (Supp.) 85; *Byrd v. State*, 57 Miss. 243; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; *Wilke v. People*, 53 N. Y. 525; *People v. Briggs*, 60 How. (N. Y.) Pr. 17; *People v. Moore*, 65 Id. 177; *Taulman v. State*, 37 Ind. 353.

<sup>2</sup> *Turpin v. State*, 55 Md. 462; *Commonwealth v. Gannon*, 97 Mass. 547; *Commonwealth v. Welch*, Id. 593; *State v. Armstrong*, 4 Minn. 335; *State v. Moulton*, 48 N. H. 485; *People v. Crandon*, 17 Hun (N. Y.)

490 (but compare *People v. Commrs. of Charities*, 9 Id. 212); *Steen v. State*, 20 Ohio St. 333; *Schultz v. State*, 32 Id. 276; *Gibson v. Commonwealth*, 87 Pa. St. 253.

<sup>3</sup> *Rickerstriker v. State*, 31 Ark. 207; *Mann v. State*, 44 Tex. 642.

<sup>4</sup> *State v. Brown*, 28 La. Ann. 279.

<sup>5</sup> *Dixon v. People*, 18 Mich. 84.

<sup>6</sup> *State v. McCord*, 8 Kan. 232.

<sup>7</sup> Stat. 1873, ch. 137, § 5; *State v. Black*, 63 Me. 210.

<sup>8</sup> *People v. Hovey*, 92 N. Y. 554; *s. c.*, 29 Hun, 382.

contradict her husband's testimony for the State.<sup>1</sup> In Texas, husband and wife are competent for each other in criminal cases, but not against each other;<sup>2</sup> and if either be competent against the person on trial, the other is also.<sup>3</sup>

(2) *Offences committed by one against the other.* Where the offence on trial is a personal injury alleged to have been committed by the husband upon the wife, or *vice versa*, the injured spouse is a competent witness in favor of the one on trial,<sup>4</sup> or on the part of the prosecution.<sup>5</sup> Thus the husband being indicted for assault and battery upon his wife,<sup>6</sup> she is competent to testify against him, where a lasting injury is inflicted, or threatened to be inflicted, upon her,<sup>7</sup> or where no other person was present when the offence was committed;<sup>8</sup> and she is compellable to testify in such cases.<sup>9</sup> So, also, she may testify against her husband on his trial for attempting to poison her,<sup>10</sup> or for using an instrument with intent to cause her to miscarry,<sup>11</sup> or on his trial for abandoning her.<sup>12</sup> She cannot, however, testify against him on his trial for conspiring to obtain a divorce, unless the indictment charges the commission of personal violence upon her, or the intention to commit it;<sup>13</sup> or on his trial for suborning witnesses to wrong her in a judicial proceeding.<sup>14</sup> Nor can she be a witness against him on his trial for the larceny of her property,<sup>15</sup> or for incest with her daughter by a former marriage.<sup>16</sup>

<sup>1</sup> *State v. Parrot*, 79 N. C. 615; *State v. Borden*, 6 R. I. 495.

<sup>2</sup> *Griffin v. State*, 32 Tex. 164 (where the right of the prosecution to cross-examine was denied); *Creamer v. State*, 34 Tex. 173 (where such right was sustained).

<sup>3</sup> *Daffin v. State*, 11 Tex. App. 76.

<sup>4</sup> *People v. Fitzpatrick*, 5 Park. (N. Y.) Cr. 26. Compare *Bihin v. Bihin*, 17 Abb. (N. Y.) Pr. 19.

<sup>5</sup> *People v. Carpenter*, 9 Barb. (N. Y.) 580.

<sup>6</sup> *United States v. Fitton*, 4 Cranch, C. C. 658; *United States v. Smallwood*, 5 Id. 35; *Turner v. State*, 60 Miss. 351; s. c., 45 Am. Rep. 412.

<sup>7</sup> *State v. Hussey*, Busb. (N. C.) L. 123; *State v. Davidson*, 77 N. C. 522.

<sup>8</sup> *State v. Davis*, 3 Brev. (S. C.) 3.

<sup>9</sup> *Turner v. State*, *supra*. This case decides that it is *her privilege* to testify

or not as she may elect. Her husband cannot complain of the action of the court in compelling her to give evidence over his objection.

<sup>10</sup> *People v. Northrup*, 50 Barb. (N. Y.) 147.

<sup>11</sup> *State v. Dyer*, 59 Mo. 303.

<sup>12</sup> *State v. Brown*, 67 N. C. 470. Only to prove the fact of abandonment, however, not to prove the marriage.

<sup>13</sup> *Commonwealth v. McEwen*, 1 Pa. L. J. Rep. 140.

<sup>14</sup> *People v. Carpenter*, 9 Barb. (N. Y.) 580.

<sup>15</sup> *Overton v. State*, 43 Tex. 616. Nor can he testify against her on her trial for stealing his goods. *R. v. Brittleton*, L. R. 12 Q. B. D. 266; 32 W. R. 463.

<sup>16</sup> *Compton v. State*, 13 Tex. App. 271; s. c., 44 Am. Rep. 703; *overrul-*

On the other hand, on her husband's trial for assault and battery upon herself, she may testify in his favor, to disprove the charge,<sup>1</sup> for it is well settled that when, in any case, husband and wife are competent witnesses against each other, they are also competent witnesses for each other.<sup>2</sup>

So, where the wife is prosecuted for assaulting her husband, he is a competent witness against her.<sup>3</sup>

(3) *Wife of party jointly indicted.* Another exception to the general rule is, that where, upon a joint indictment, there is a separate trial, the husband or wife of the defendant not upon trial is not necessarily incompetent as a witness for the prosecution. If willing to testify, he or she is competent, except, perhaps, where the offence is in its nature joint, as in conspiracy,<sup>4</sup> where the acquittal of one defendant works the acquittal of the others.<sup>5</sup>

So, also, the wife of one of three jointly indicted defendants is competent against the other two, after the indictment has been dismissed as to her husband;<sup>6</sup> but not, it seems, before such dismissal.<sup>7</sup> And where the husband is defaulted on his recognizance, the wife becomes competent for the other defendant.<sup>8</sup> Indeed, she is generally held competent, in such cases, when she is offered as a witness *in favor* of the defendant on trial;<sup>9</sup> although respectable cases are not lacking which hold the other way.<sup>10</sup>

Where the trial as well as the indictment is joint, it is

*ing Morrill v. State*, 5 Tex. App. 447, and *Roland v. State*, 9 Id. 277.

<sup>1</sup> *State v. Neill*, 6 Ala. 685; *Commonwealth v. Murphy*, 4 Allen (Mass.) 491; *Tucker v. State*, 71 Ala. 342.

<sup>2</sup> *Tucker v. State*, 71 Ala. 342.

<sup>3</sup> *Whipp v. State*, 34 Ohio St. 87. See also *People v. Marble*, 38 Mich. 117. *Contra*, *Turnbull v. Commonwealth*, 79 Ky. 495.

<sup>4</sup> *Commonwealth v. Reid*, 8 Phil. (Pa.) 385; s. c., 1 Leg. Gaz. Rep. 182; *State v. Drawdy*, 14 Rich. (S. C.) 87.

<sup>5</sup> *United States v. Addate*, 6 Blatchf. (U. S.) 76; *Williams v. State*, 69 Ga. 11. But see to the contrary, *State v. Bradley*, 9 Rich. (S. C.) 168; *State v. McGrew*, 13 Id. 316; *State v. Burlingham*, 15 Me. 104. Where the husband is suspected, but not indicted,

and the defendant seeks to show the husband to be the guilty party, the wife may testify to facts exculpatory of her husband. *Fincher v. State*, 58 Ala. 215.

<sup>6</sup> *Ray v. Commonwealth*, 12 Bush (Ky.) 397.

<sup>7</sup> *Dill v. State*, 1 Tex. App. 278.

<sup>8</sup> *State v. Worthing*, 31 Me. 62.

<sup>9</sup> *Thompson v. Commonwealth*, 1 Metc. (Ky.) 13; *Cornelius v. Commonwealth*, 3 Id. 481; *State v. Burnside*, 37 Mo. 343; *Commonwealth v. Manson*, 2 Ashm. (Pa.) 31; *Moffit v. State*, 2 Humph. (Tenn.) 99; *Workman v. State*, 4 Sneed (Tenn.) 425.

<sup>10</sup> *United States v. Wade*, 2 Cranch, C. C. 680; *Collier v. State*, 20 Ark. 36; *Pullen v. People*, 1 Doug. (Mich.) 48.

pretty well settled that the wife of one defendant is not a competent witness for any of the others.<sup>1</sup>

(4) *Wife of accomplice, or of witness for State.* — Where the husband has testified as an accomplice, or State's witness, his wife is a competent witness to corroborate his testimony,<sup>2</sup> especially where her husband has not been indicted though evidently an accomplice.<sup>3</sup> So, also, she may prove any independent facts not sworn to by her husband and not forming any part of his acts, although those facts fasten a guilty knowledge on the defendant.<sup>4</sup> She may also testify on the other side, to show that her husband testified under a bias against the defendant, but not to contradict him.<sup>5</sup>

(5) *Wife of person injured by the crime.* At common law, where the person whose goods were stolen was not interested in the prosecution of the thief, his wife was a competent witness for the prosecution; but where the husband was himself disqualified by reason of an interest in the fine, she was not competent.<sup>6</sup> But this rule of exclusion of the wife because of the *husband's interest* in the event is now swept away by the enabling acts, along with the incompetency of the husband himself — the person injured — on account of his interest.<sup>7</sup>

(6) *Rules peculiar to prosecutions for adultery.* — Upon the question whether, upon a criminal prosecution for adultery, the husband or wife of either of the guilty persons shall be admitted as a witness for the prosecution, the decisions are in direct conflict. Some of them hold that under statutes permitting husband and wife to testify against one another on a criminal prosecution, for an offence committed by one against the other, the one may testify against the other on an indictment of the other for adultery.<sup>8</sup>

<sup>1</sup> Commonwealth v. Easland, 1 Mass. 15; Commonwealth v. Robinson, 1 Gray (Mass.) 555; State v. Waterman, 15 So. Car. 540; Mask v. State, 32 Miss. 405. But see Morissey v. People, 11 Mich. 327; State v. Waterman, 1 Nev. 543.

<sup>2</sup> State v. Moor, 25 Iowa, 128; Haskins v. People, 16 N. Y. 344; Blackburn v. Commonwealth, 12 Bush (Ky.) 181; Williams v. State, 69 Ga. 11.

<sup>3</sup> Powell v. State, 58 Ala. 362.

<sup>4</sup> United States v. Horn, 5 Blatchf. (U. S.) 102.

<sup>5</sup> Cornelius v. State, 12 Ark. 782. See also Clubb v. State, 14 Tex. App. 192; State v. Mooney, 64 N. C. 54.

<sup>6</sup> United States v. Shorter, 1 Cranch, C. C. 315.

<sup>7</sup> *Supra*, §§ chap. viii. Where the trial is for the homicide of the husband, the wife is a competent witness to prove his dying declarations. State v. Ryan, 30 La. Ann. Part II. 1176.

<sup>8</sup> Roland v. State, 9 Tex. App. 277; s. c., 35 Am. Rep. 743; Alonzo v. State, 15 Tex. App. 378; Morrill v. State, 5 Tex. App. 447. In Wisconsin



Many cases, however, of equal respectability are found, which lay down the contrary rule. Thus the Supreme Court of Alabama holds that the husband of a woman, jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them.<sup>1</sup> In North Carolina, he cannot testify against the female defendant (his wife) even though he may have obtained an absolute divorce before the trial of the indictment;<sup>2</sup> nor can he testify for the prosecution in Pennsylvania,<sup>3</sup> and the same has been held in Maine, Massachusetts, and Texas.<sup>4</sup>

(7) *Rules peculiar to prosecutions for bigamy.*—Here, too, the cases are in conflict, some of them holding the first wife of the alleged bigamist competent to testify against him, on the ground that his second marriage is an offence com-

it is held that after a divorce *a vinculo*, the husband is competent to prove the marriage on an indictment against another for adultery with the wife before divorce. *State v. Dudley*, 7 Wis. 664. See also *Parsons v. People*, 21 Mich. 509. In *Lord v. State*, 23 N. W. Rep. 507, a very recent case, the Supreme Court of Nebraska, *per* Maxwell, J., say:—

“Section 331 of the Civil Code provides that ‘the husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by one against the other, but they may in all criminal prosecutions be witnesses for each other.’ At common law a wife could not be a witness against her husband; and there is a direct conflict in the authorities, under statutes similar to ours, as to her right to be a witness in a criminal proceeding for a crime committed by her husband against her. This is the first time the question has been presented in this court, and it is therefore necessary to ascertain the intention of the legislature in passing the section above referred to, and give force to that intention. The statute makes it an offence for a husband to desert his wife and live and cohabit with another woman. If the husband is prosecuted for the

offence, the prosecution certainly would be a criminal proceeding for a crime committed against the wife. The word ‘crime’ is frequently used to designate gross violations of law, in distinction from misdemeanors; but in its broad sense it means any violation of law. *Webst. Dict.* 312, 313. And in our view it was intended by the legislature to include the offence here charged, and the ends of justice will be best subserved by permitting the wife to testify. This is the rule adopted in Iowa, under a similar statute. *State v. Bennett*, 31 Iowa, 24; *State v. Sloan*, 55 Iowa, 219; s. c., 7 N. W. Rep. 516; *State v. Hazen*, 39 Iowa, 648. In Texas also. *Morrill v. State*, 5 Tex. Ct. App. 447; *Roland v. State*, 9 Tex. Ct. App. 277.”

<sup>1</sup> *Cotton v. State*, 62 Ala. 12.

<sup>2</sup> *State v. Jones*, 89 N. C. 559, where, however, he was permitted to testify in her favor.

<sup>3</sup> *Commonwealth v. Gordon*, 2 Brews. (Pa.) 569; *Commonwealth v. Flohr*, 3 Crim. L. Mag. 841.

<sup>4</sup> *State v. Welch*, 26 Me. 30; *Commonwealth v. Sparks*, 7 Allen (Mass.) 534; *Thomas v. State*, 14 Tex. App. 70. See also to same effect, *State v. Gardner*, 1 Root (Conn.) 485; *Commonwealth v. Jailer*, 1 Grant (Pa.) Cas. 218. And see *People v. Hendrickson*, 10 N. W. Rep. 169.

mitted against her.<sup>1</sup> So, also, the second wife has been admitted to testify for the prosecution.<sup>2</sup> But the true rule as to the second wife is believed to be the following, recently laid down by the Supreme Court of the United States: "The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first."<sup>3</sup>

In a recent Texas case it is held that the defendant may compel the woman with whom the first marriage is charged to have been contracted to testify, in rebuttal of the State's evidence as to such marriage.<sup>4</sup>

<sup>1</sup> *State v. Sloan*, 13 Chic. L. N. 145. See also *People v. Houghton*, 24 Hun (N. Y.) 501; *State v. Hughes*, 58 Iowa, 165; *Williams v. State*, 67 Ga. 260.

<sup>2</sup> *Johnson v. State*, 61 Ga. 305; *Finney v. State*, 3 Head (Tenn.) 544.

<sup>3</sup> *Miles v. United States*, 103 U. S.

304, 313; s. c., 2 Crim. L. Mag. 489, reversing 2 Utah T. 19, and reviewing the early English cases.

<sup>4</sup> *Dumas v. State*, 14 Tex. App. 464. See also *People v. Chase*, 16 N. Y. Week. Dig. 143.

## CHAPTER XI.

### TRYING THE QUESTION OF COMPETENCY.

- § 171. Objections to Competency, generally.
- § 172. Grounds of Objection.
- § 173. The Proper Time to interpose the Objection.
- § 174. Trial of Objections to Competency.
- § 175. Examination on the *Voir Dire*.
- § 176. Producing Extrinsic Evidence.
- § 177. Presumptions and Burden of Proof.
- § 178. Waiver of Objections to Competency.
- § 179. Review. Errors cured below.

§ 171. **Objections to Competency, generally.** — It is a well-settled rule, that the competency of one offered as a witness, to testify in the case, will be presumed, and the party objecting to his competency must state the grounds of his objections. A general, indefinite objection will not suffice.<sup>1</sup> Thus if the testimony of a witness is intended to be objected to, in ejectment, because of his holding adjoining lands, his interest must be located on the plats.<sup>2</sup> The nature of his interest, if that is the ground of alleged incompetency, must be specified.<sup>3</sup> A witness is often competent for some purposes and not for others; therefore, a specific objection must be taken to such parts of his testimony as are deemed inadmissible.<sup>4</sup> The competency of particular answers of the witness cannot be raised under a general objection to the competency of the witness himself.<sup>5</sup> But where the ground of a specific objection to the witness has been removed, and a general objection afterwards overruled, it seems the objector may thereafter avail himself of all grounds of exception.<sup>6</sup> Obviously, one

<sup>1</sup> Pegg v. Warford, 7 Md. 582; Brown v. State, 24 Ark. 620; State v. Levy, 5 La. Ann. 64.

<sup>2</sup> Hall v. Gittings, 2 Har. & J. (Md.) 112; Gittings v. Hall, 1 Id. 14; Chapline v. Keedy, 3 Har. & M. (Md.) 578. See Stoddert v. Manning, 2 Har. & G. (Md.) 147.

<sup>3</sup> Leach v. Kelsey, 7 Barb. (N. Y.) 466; Snyder v. May, 19 Pa. St. 235.

<sup>4</sup> Peters v. Horbach, 4 Pa. St. 134; Chunot v. Larsen, 43 Wis. 536; Holloway v. Galloway, 51 Ill. 159. But see Gerrish v. Cummings, 4 Cush. (Mass.) 391.

<sup>5</sup> Anonymous, 3 Abb. (N. Y.) Pr. 102.

<sup>6</sup> Irwin v. Shumaker, 4 Pa. St. 199.

who calls a witness cannot object to his competency,<sup>1</sup> and even a party to the record was never excluded as a witness merely by the raising of the objection: such objection had to be sustained by the court at the trial.<sup>2</sup>

§ 172. **Grounds of Objection.**—The various grounds of incompetency of witnesses having been considered in the preceding chapters of this work, it remains to examine here some of the many objections to witnesses which the courts have refused to sustain. Among these unavailable objections to a witness' competency are, relationship of kindred to the party calling him;<sup>3</sup> that the witness is called to prove the title to the property sued for in trover or replevin, to be in himself;<sup>4</sup> that he has been heard to say, not under oath, that he must pay the damages, if any are recovered;<sup>5</sup> that his testimony will tend to clear him of a fraud charged upon him by another witness;<sup>6</sup> that he was not competent when suit was begun—if he is competent when offered as a witness;<sup>7</sup> that he has received a copy of the interrogatories before the time of testifying, without any comments, or any influence used to affect his answers; or has received a letter from one of the parties, requesting him to tell the whole truth, without suggestion as to what the writer considered the truth to be.<sup>8</sup> A witness may be competent to prove some facts, and incompetent as to others;<sup>9</sup> if competent to answer any questions in the cause, he should not be rejected altogether.<sup>10</sup>

So, also, the facts that the witness is biased in favor of the party calling him,<sup>11</sup> or is under a moral or honorary obligation

<sup>1</sup> *Seip v. Storch*, 52 Pa. St. 210.

<sup>2</sup> *United States v. Schindler*, 10 Fed. Rep. 547.

<sup>3</sup> *High v. Stainback*, 1 Stew. (Ala.) 24.

<sup>4</sup> *Ashby v. West*, 3 Ind. 170.

<sup>5</sup> *Jones v. Tevis*, 4 Litt. (Ky.) 25.  
*S. P.*, *Bank of Columbia v. Magruder*,  
6 Har. & J. (Md.) 172.

<sup>6</sup> *Babb v. Clemson*, 12 S. & R. (Pa.) 328.

<sup>7</sup> *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Metcalf v. Young*, Id. 643; *Crosby v. Floyd*, 2 Bail. (S. C.) 133; *Henry v. Morgan*, 2 Binn. (Pa.) 497. So a witness incompetent to testify at the time of examination, is incompetent, notwithstanding he was com-

petent at the time of commencing the suit. *Shannon v. Fuller*, 20 Ga. 566. But he will not be allowed to disqualify himself, and thus deprive a party of the benefit of his testimony. *Clark v. Brown*, 1 Barb. (N. Y.) 215.

<sup>8</sup> *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90.

<sup>9</sup> *Wright v. Rogers*, 3 McLean (U. S.) 229.

<sup>10</sup> *Prather v. Lentz*, 6 Blackf. (Ind.) 244. See also, generally, *Burgess v. Lane*, 3 Me. 165; *Kimball v. Thompson*, 4 Cush. (Mass.) 441; *People v. Annis*, 13 Mich. 511; *Manchester Iron Co. v. Sweeting*, 10 Wend. (N. Y.) 162.

<sup>11</sup> *Newton v. Pope*, 1 Cow. (N. Y.) 109.

to such party,<sup>1</sup> are not good objections to his competency, but go merely to the question of his credibility.<sup>2</sup> Although the same rules are applied in chancery as at law, as to the competency of witnesses, yet the tendency, in modern times, is to let most objections go to the credibility only; and especially is this more safe where the judges weigh the evidence.<sup>3</sup>

§ 173. **The Proper Time to interpose the Objection.** — As a general rule an objection to the competency of a witness should be made before the commencement of his examination-in-chief, if the ground of incompetency is then known to the party objecting;<sup>4</sup> but if not then known, the objection may be made at any time during the trial, if made as soon as the interest or incompetency of the witness is discovered.<sup>5</sup> If not made at the first opportunity, the objection will be deemed to have been waived.<sup>6</sup> If his incompetency first appears on the examination-in-chief,<sup>7</sup> or even on the cross-examination,<sup>8</sup> the objection may then be made. The rule is, that where a witness, in any stage of a cause, in law or equity, discovers himself to be interested, his testimony may be rejected,<sup>9</sup> or the jury may be instructed to disregard his testimony.<sup>10</sup>

If the objection is not made until after the testimony is closed, a party cannot insist, as a matter of right, that the testimony of an interested witness be stricken out,<sup>11</sup> especially if his incompetency was such as might have been removed

<sup>1</sup> *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94.

<sup>2</sup> The two questions, as to competency and credibility, are distinct and independent, and even the fraudulent conduct of a witness which might seriously affect his credibility, does not destroy his competency. *Rose v. Bates*, 12 Mo. 30.

<sup>3</sup> *Ferson v. Sanger*, 1 Woodb. & M. (U. S.) 138.

<sup>4</sup> *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Patterson v. Wallace*, 44 Pa. St. 88; *Howser v. Commonwealth*, 51 Id. 332; *Milsap v. Stone*, 2 Col. T. 137.

<sup>5</sup> *Veiths v. Hagg*, 8 Iowa, 163; *State v. Damery*, 48 Me. 327; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Johnson v. Alexander*, 14 Tex. 332.

<sup>6</sup> *Drake v. Foster*, 28 Ala. 640;

*Hudson v. Crow*, 26 Ala. 515; *Lewis v. Morse*, 20 Conn. 211; *Kingsbury v. Luchanan*, 11 Iowa, 387; *Stuart v. Lake*, 33 Me. 87; *Groshon v. Thomas*, 20 Md. 234; *Heely v. Barnes*, 4 Den. (N. Y.) 73; *Gregory v. Dodge*, 4 Paige (N. Y.) 557; *Rogers v. Dibble*, 3 Id. 238.

<sup>7</sup> *Fisher v. Willard*, 13 Mass. 379; *Brooks v. Crosby*, 22 Cal. 42; *Sheridan v. Medara*, 2 Stock. (N. J.) Eq. 469.

<sup>8</sup> *Carter v. Graves*, 7 Miss. 9.

<sup>9</sup> *Swift v. Dean*, 6 Johns. (N. Y.) 523; *Mitchell v. Mitchell*, 11 Gill & J. (Md.) 388; *Andre v. Bodman*, 13 Md. 241.

<sup>10</sup> *Morton v. Beall*, 2 Har. & G. (Md.) 136.

<sup>11</sup> *Newsom v. Huey*, 36 Ala. 37. S. P., *Baughcr v. Duphorn*, 9 Gill (Md.)

by a release of interest.<sup>1</sup> The objection comes too late after verdict, and if not made at the trial, the question of the competency of a witness examined at the trial will not be considered on appeal or error,<sup>2</sup> nor will his admission, though interested, afford ground for a new trial, unless his interest was known and concealed by the party producing him.<sup>3</sup>

§ 174. **Trial of Objections to Competency.**—Objection to the competency of a witness having been made, the question of competency must be decided, no matter how difficult it may be to determine as to his interest or want of interest. To reject him, in such a case, without deciding the question, is error,<sup>4</sup> and to admit him is equally erroneous.<sup>5</sup> The question is for the court, not the jury, to decide,<sup>6</sup> and there are two methods of determining it, (1) by examining the witness on his *voir dire*, and (2) by evidence extrinsic of his own. But both these methods cannot be pursued; the party, having elected to use the one, cannot afterwards adopt the other.<sup>7</sup>

If the objection arises upon the examination of the witness as such, he may be further interrogated as to facts tending to support his competency.<sup>8</sup> If he is competent as to some

314; *Inglebright v. Hammond*, 19 Ohio, 337; *Rees v. Livingston*, 41 Pa. St. 113; *McInroy v. Dyer*, 47 Id. 118.

<sup>1</sup> *Roosevelt v. Ellithorp*, 10 Paige (N. Y.) 415; *Town v. Needham*, 3 Id. 546. But see *Mohawk Bank v. Atwater*, 2 Id. 54.

Where the testimony is taken by deposition, the competency of the witness may be objected to at the trial. *Talbot v. Clark*, 8 Pick. (Mass.) 51. But see to the contrary, *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 193; *Gregory v. Dodge*, 14 Wend. (N. Y.) 593; *U. S. v. One Case of Pencils*, 1 Paine (U. S.) 400.

<sup>2</sup> *House v. House*, 5 Ind. 237; *Commonwealth v. Green*, 17 Mass. 515; *Snow v. Batchelder*, 8 Cush. (Mass.) 513; *Essex Bank v. Rix*, 10 N. H. 201; *Jackson v. Barron*, 37 N. H. 494; *Edington v. Mutual &c. Ins. Co.*, 5 Hun (N. Y.) 1; *State v. Scott*, 1 Bail. (S. C.) 270.

<sup>3</sup> *Niles v. Brackett*, 15 Mass. 378.

<sup>4</sup> *Walker v. Skeene*, 3 Head (Tenn.) 1.

<sup>5</sup> *State v. Secrest*, 80 N. C. 450.

<sup>6</sup> *Reynolds v. Lounsbury*, 6 Hill (N. Y.) 534; *Chouteau v. Searcy*, 8 Mo. 733; *Cook v. Mix*, 11 Conn. 432; *Amory v. Fellows*, 5 Mass. 219, 229; *Tucker v. Welsh*, 17 Id. 160; *Dole v. Thurlow*, 12 Metc. (Mass.) 157; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Stall v. Catskill Bank*, 18 Id. 466; *Rohrer v. Morningstar*, 18 Ohio, 579; *City Council v. Haywood*, 2 Nott & M. (S. C.) 308.

<sup>7</sup> *Miffin v. Bingham*, 1 Dall. 272; *Mallet v. Mallet*, 1 Root (Conn.) 501; *Gordon v. Bowers*, 16 Pa. St. 226; *M'Allister v. Williams*, 1 Overt. (Tenn.) 107, 119; *Bridge v. Wellington*, 1 Mass. 219; *Chance v. Hine*, 6 Conn. 231; *Butler v. Butler*, 3 Day (Conn.) 214; *The Watchman*, 1 Ware, 232; *Waughop v. Weeks*, 22 Ill. 350; *Diversy v. Will*, 28 Ill. 216; *Walker v. Collier*, 37 Ill. 362; *Welden v. Buck, Anth.* (N. Y.) 9. There are, however, cases to the contrary as to the last point. See *infra*, § 175.

<sup>8</sup> *McRae v. Rhodes*, 22 Ark. 315.

facts, but not as a general witness in the case, the party calling him should state what he proposes to prove by him, to the end that the court may judge as to his limited competency.<sup>1</sup> His character, not his conduct, decides his competency.<sup>2</sup>

In determining the competency of a witness who has been sworn *de bene esse*, the court should disregard the testimony of the witness thus sworn, and look only to the other evidence given.<sup>3</sup> If he acknowledges an expectation of gain or loss, according to the result of the case, the judge should reject him.<sup>4</sup> If he claims to be disinterested, and the facts he discloses are consistent with such claim, his testimony should go to the jury.<sup>5</sup> In doubtful cases the court should admit the witness, leaving the question of interest or no interest to the decision of the jury.<sup>6</sup> Where the objector attempts, but fails, to show interest in the witness, the court will not set him aside, though it may, later on, appear that he is, in fact, interested in a question in issue.<sup>7</sup>

§ 175. **Examination on the Voir Dire.** — The strict and regular method of raising an objection to the competency of a witness, is by examining him on the *voir dire*,<sup>8</sup> i.e., he should be sworn to answer all such questions as the court shall put to him touching his competency as a witness in the cause, his answers not to be used as evidence in the case to be laid before the jury. Strictly, this examination, being of a preliminary nature, should be taken before the witness is examined or sworn in chief, and formerly, this rule was strictly adhered to.<sup>9</sup>

Under the more modern practice, the objector may have the witness sworn on the *voir dire*, or allow him to be sworn in chief, and examine him as to his competency, or introduce proof showing his incompetency. If he adopts the former course, he cannot afterwards resort to the latter;<sup>10</sup> and if he

<sup>1</sup> Stewart v. Kirk, 69 Ill. 509.

<sup>8</sup> *Veritatem dicere; Vrai dire.*

<sup>2</sup> Allen v. Yeung, 6 T. B. Mon. (Ky.) 136.

<sup>9</sup> See 1 T. R. 717; Dewdney v. Palmer, 4 Mees. & W. 664. But this rule is no longer strictly adhered to.

<sup>3</sup> Mott v. Hicks, 1 Cow. (N. Y.) 513.

<sup>10</sup> Le Barron v. Redman, 30 Me. 536;

<sup>4</sup> Innis v. Miller, 2 Dall. (U. S.) 50.

<sup>5</sup> Strawbridge v. Spann, 8 Ala. 820.

<sup>6</sup> Gordon v. Bowers, 16 Pa. St. 226.

<sup>7</sup> Coit v. Bishop, 2 Root (Conn.) 222. To the contrary, Schillinger v. M'Cann, 6 Me. 364.

Stewart v. Lake, 33 Me. 87; Gordon v. Bowen, 16 Pa. St. 226; Schnader v. Schnader, 26 Id. 384; Doer v. Osgood, 2 Tyler (Vt.) 28; Butler v. Butler, 3 Day (Conn.) 214, 218.

fails to prove the witness incompetent by the introduction of extraneous proof, he cannot then resort to the *voir dire*.<sup>1</sup> But it has been decided that a resort to one method to prove one ground of interest, does not preclude a resort to the other method to prove the interest of the witness on another ground;<sup>2</sup> and that the presiding judge may, in his discretion, permit a party who has failed to prove interest by extrinsic evidence, to examine the witness on his *voir dire*.<sup>3</sup> So, the court has discretion whether the preliminary oath as to interest, or the oath-in-chief, shall be administered. But the better and more approved practice now is to swear the witness-in-chief, and bring out the facts showing his interest, either on direct or cross examination.<sup>4</sup>

On the other hand, where evidence of the interest of the witness is given by others, he cannot be examined on the *voir dire* to disprove such interest;<sup>5</sup> otherwise, where his interest appears from his own testimony.<sup>6</sup> The party offering the witness has a right to cross-examine him when put upon his *voir dire*,<sup>7</sup> and the witness may prove his own release of interest,<sup>8</sup> or want of it,<sup>9</sup> or that it is balanced.<sup>10</sup> But, it seems, he cannot show that he had no interest at the time the facts to be established by his testimony occurred.<sup>11</sup>

The witness may be examined, so far as relates to his interest, in respect to contracts, records, or documents, not produced at the trial; this being an exception to the rule

<sup>1</sup> *Bridge v. Wellington*, 1 Mass. 219, 221, 222; *Mifflin v. Bingham*, 1 Dall. (U. S.) 272, 275; *Stebbins v. Sackett*, 5 Conn. 258, 261; *Chance v. Hine*, 6 Id. 231. But see *Main v. Newson*, Anth. (N. Y.) 11.

<sup>2</sup> *Stebbins v. Sackett*, *supra*.

<sup>3</sup> *Butler v. Tufts*, 13 Me. 302.

<sup>4</sup> *Seeley v. Engell*, 17 Barb. (N. Y.) 530.

<sup>5</sup> *Carroll v. Pathkiller*, 3 Port. (Ala.) 279; *Robinson v. Turner*, 3 Greene (Iowa) 540; *Hescox v. Hendree*, 27 Ala. 216.

<sup>6</sup> *Montgomery Plank Road Co. v. Webb*, 27 Ala. 618. See also *Evans v. Eaton*, 1 Pet. C. C. 322; *Ely v. Jones, Coxe* (N. J.) 46.

<sup>7</sup> *Beach v. Covillaud*, 2 Cal. 237; *Succession of Weigel*, 18 La. Ann. 49.

<sup>8</sup> *Ault v. Rawson*, 14 Ill. 484; *Fanning v. Myers*, Anth. (N. Y.) 47; *Blackstock v. Leidy*, 19 Pa. St. 335.

<sup>9</sup> *Requa v. Requa*, 22 N. Y. 354; *Sigourney v. Sibley*, 21 Pick. (Mass.) 101.

<sup>10</sup> *Tarleton v. Johnson*, 25 Ala. 300.

<sup>11</sup> *Gill's Will*, 2 Dana (Ky.) 390. See *Banks v. Clegg*, 14 Pa. St. 390.

What questions may be put to a witness on his examination on the *voir dire*, and the extent to which he may be examined, see *Stebbins v. Sackett*, 5 Conn. 258; *Hooker v. Johnson*, 6 Fla. 730; *Bailey v. Barnelly*, 23 Ga. 582; *Moore v. Sheridine*, 2 Har. & M. (Md.) 453; *Hamblett v. Hamblett*, 6 N. H. 333; *Blackwell v. Hageman*, 2 Penn. (N. J.) 1032; *Reid v. Dobson*, 1 Overt. (Tenn.) 396.



requiring the best evidence to be produced or its loss accounted for.<sup>1</sup>

§ 176. **Producing Extrinsic Evidence.** — With regard to the sort of evidence, *extra* the witness, which may be received to impeach his competency, it may be observed that, although it is addressed in the first instance to the court, still, as it may, in doubtful cases, ultimately be submitted to the jury, it ought to be *competent* evidence,<sup>2</sup> and entirely free from doubt.<sup>3</sup> Evidence of the admissions and declarations of the witness, made out of court, will not be sufficient to exclude him on the ground of interest;<sup>4</sup> but statements so made by the party calling him will be.<sup>5</sup> Of course, counter-evidence is admissible, to sustain the competency of the witness.<sup>6</sup>

§ 177. **Presumptions and Burden of Proof.** — The presumption being in favor of competency, the burden is upon the objector to prove that one offered as a witness is incompetent to testify by reason of interest or otherwise.<sup>7</sup> Thus, to exclude a witness on the ground that his testimony, if admitted, will tend to protect him from claims against him, it must first be shown that there is, at least, a *prima facie* case of liability against him, and that he is exposed to certain danger from such claims.<sup>8</sup> The objector must point out to

<sup>1</sup> Babcock v. Smith, 31 Ill. 57; Miller v. Mariners' Church, 7 Me. 51; Hays v. Richardson, 1 Gill & J. (Md.) 366; Mayo v. Gray, 2 Penn. (N. J.) 837; Howser v. Commonwealth, 51 Pa. St. 332.

As to the *effect* and *conclusiveness* of his answers, either to show his competency or incompetency, see Crary v. Caradine, 4 Ark. 225; McNeill v. Rousseau, 20 Ga. 593; Jennings v. Estes, 16 Me. 323. See also 1 Phil. Ev. \*98, note (5).

<sup>2</sup> Johnson v. Kendall, 20 N. H. 304.

<sup>3</sup> Haynes v. Hunsicker, 26 Pa. St. 58.

<sup>4</sup> Young v. Garland, 18 Me. 409; Dun v. Cronise, 9 Ohio, 82; Freeman v. Luckett, 2 J. J. Marsh. (Ky.) 390; Davis v. Whiteside, 4 Id. 116; Stuart v. Lake, 33 Me. 87; Peirce v. Chase, 3 Mass. 487; Commonwealth v. Waite, 5 Mass. 261; Vining v. Wooten, Cooke (Tenn.) 127; Nichols v. Holgate, 2 Aik. (Vt.) 138, 140; Ingram

v. Watkins, 1 Dev. & B. (N. C.) 442, 445; Rich v. Eldredge, 42 N. H. 153. To the contrary, Colston v. Nichols, 1 Har. & J. (Md.) 105; Bean v. Jenkins, Id. 135.

<sup>5</sup> Walker v. Coursin, 19 Pa. St. 321; Peirce v. Chase, 8 Mass. 487. But see High v. Stainback, 1 Stew. (Ala.) 24.

<sup>6</sup> State v. Twitty, 2 Hawks (N. C.) 440.

<sup>7</sup> State v. Holloway, 8 Blackf. (Ind.) 45; Densler v. Edwards, 5 Ala. 31; Adams v. Barrett, 3 Ga. 277; Richardson v. Hage, 24 Ga. 203; Anderson v. Irvine, 5 B. Mon. (Ky.) 488; Hamilton v. Summers, 12 Id. 11; Renwick v. Williams, 2 Md. 356; Pegg v. Warford, 7 Md. 582; Norris v. Hurd, Walk. (Mich.) 102; Hulshart v. Hart, Coxé (N. J.) 52; Lott v. Sandifer, 2 Mill (S. C.) Const. 167.

<sup>8</sup> Carrington v. Holabird, 17 Conn. 530.

the court the *ground* of incompetency.<sup>1</sup> The witness will not be excluded on the ground of interest, if the question of his interest is in doubt.<sup>2</sup>

§ 178. **Waiver of Objections to Competency.** — We have already seen that, as a general rule, the right to object to a witness, as incompetent by reason of interest, is waived unless the objection is taken at the earliest opportunity.<sup>3</sup> So, also, if a party examines a witness, in chief, knowing him to be adversely interested, he cannot afterwards raise the objection of interest.<sup>4</sup> Having had the benefit of his testimony the party cannot afterwards object to the witness on the ground of interest.<sup>5</sup> And consenting to the examination of the witness on the *voir dire* is also a waiver of the right to show incompetency by other means of evidence.<sup>6</sup> If a paper purporting to be a release of his interest is handed to the witness, and its sufficiency as a release is not objected to, this will be deemed a waiver of any objection to the witness on the ground of the insufficiency of the release.<sup>7</sup> A waiver of objection to competency made at one stage of the taking of testimony is a waiver during the whole progress of that proceeding, although several distinct depositions are sworn to by the witness at different times.<sup>8</sup> But where objection is made to the introduction of the witness, the act of cross-examining him, or the production of evidence in rebuttal of his testimony, is no waiver of the objection.<sup>9</sup>

<sup>1</sup> White Water Valley Canal Co. v. Dow, 1 Ind. 62; Leach v. Kelsey, 7 Barb. (N. Y.) 466.

<sup>2</sup> Howard v. Brown, 3 Ga. 523; Watts v. Garrett, 3 Gill & J. (Md.) 355; Duel v. Fisher, 4 Den. (N. Y.) 515. In Tennessee the contrary doctrine was held in one case, *i.e.*, that it is the business of the party offering a witness to free his competency from legal exception; and if this is left doubtful, the witness may be excluded. Story v. Saunders, 8 Humph. (Tenn.) 663. But that case is clearly opposed to the current of contemporaneous authority.

<sup>3</sup> *Supra*, § 173; Davis v. Roberts, 5 Humph. (Tenn.) 111; Legg v. McNeill, 2 Tex. 428; Levering v. Langley, 8 Minn. 107.

<sup>4</sup> Kelly v. Brooks, 25 Ala. 523;

Combs v. Bateman, 10 Barb. (N. Y.) 573; De Vendal v. Malone, 25 Ala. 272.

<sup>5</sup> Den v. Downam, 1 Green (N. J.) 135; Bogert v. Bogert, 2 Edw. (N. Y.) 399; Fulton Bank v. Stafford, 2 Wend. (N. Y.) 483; Tappan v. Butler, 7 Bosw. (N. Y.) 480.

<sup>6</sup> Hosack v. Rogers, 8 Paige (N. Y.) 229; see *supra*, § 175; Bisbee v. Hall, 3 Ohio, 449.

<sup>7</sup> Bullen v. Arnold, 31 Me. 583.

<sup>8</sup> Choteau v. Thompson, 3 Ohio St. 424. See also Beall v. Lynn, 6 Har. & J. (Md.) 336.

<sup>9</sup> Boylan v. Meeker, 4 Dutch. (N. J.) 274; Carpenter v. Ginder, 1 Wis. 243. As to the waiver of the objection that the witness is the husband or wife of a party to the suit, see Hackett v. Bonnell, 16 Wis. 471 (de-

§ 179. **Review ; Errors cured below.**— Unless the ground of the objection to the competency of the witness is pointed out to the trial court, the overruling of the objection cannot be assigned as error.<sup>1</sup> The objector will be limited, on appeal, to the specific objection made at the trial. Thus, if the objection is interest under a particular statute, interest in other respects cannot be shown on appeal.<sup>2</sup> The rejection of the witness affords no valid ground of exception, where it fails to appear in the record that he knew or could testify to anything relevant to the issue on trial;<sup>3</sup> and where his incompetency is supposed to rest on a deed not used on the trial for any purpose, such deed cannot authorize a decision by the appellate court, that the court below erred in not rejecting the evidence of the witness.<sup>4</sup> But an exception taken on the *voir dire*, and overruled, will avail the party taking it, as an exception to all the testimony of that witness given in the case.<sup>5</sup>

Sometimes irregularities occur in dealing with the objection to competency, which are cured in some subsequent stage of the trial. Thus, a withdrawal of the objection and consent to the examination of the witness, cures the error of his erroneous rejection.<sup>6</sup> And the erroneous admission of an incompetent witness may be cured by an instruction to the jury not to consider his testimony.<sup>7</sup>

ciding that the objection may be waived); and *Hubbell v. Grant*, 39 Mich. 641 (holding that it cannot be).

<sup>1</sup> *White Water Valley Canal Co. v. Dow*, 1 Ind. 141.

<sup>2</sup> *Bunker v. Gilmore*, 40 Me. 88.

<sup>3</sup> *Bates v. Barber*, 4 Cush. (Mass.) 107.

<sup>4</sup> *Emory v. Owings*, 3 Md. 178. See also *Grant v. Levan*, 4 Pa. St. 393.

<sup>5</sup> *Smith v. Fairbanks*, 27 N. H. 521.

<sup>6</sup> *Smull v. Jones*, 6 Watts & S. (Pa.) 122.

<sup>7</sup> *Lester v. McDowell*, 18 Pa. St. 91. A dangerous rule to apply in all cases. See also *Lay v. Lawson*, 23 Ala. 377; *People v. Anderson*, 26 Cal. 129.



PART II.



CREDIBILITY.



## PART II. — CREDIBILITY.

### CHAPTER XII.

#### ELEMENTARY PRINCIPLES.

- § 180. The question of credibility one for the jury.
- § 181. How far dependent on means of knowledge or recollection.
- § 182. Or on the character and conduct of the witness.
- § 183. Or his manner and appearance.
- § 184. Or his bias or interest.
- § 185. Or relationship to party calling him.
- § 186. Credibility of parties in civil actions.
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- § 188. Of accomplices.
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- § 190. Of defendants in criminal cases.
- § 191. Rules for weighing testimony.
- § 192. The maxim "*falsus in uno falsus in omnibus*."
- § 193. Positive and negative testimony.
- § 194. Conflicting testimony.
- § 195. When one witness is sufficient.

#### § 180. The Question of Credibility one for the Jury.—

While it is the province of the court to pass upon the *competency* of witnesses, it is altogether for the jury, as exclusive judges of the facts, to say what degree of *weight* or *credibility* shall be given to their testimony,<sup>1</sup> and it is reversible error for the court, in its instructions to the jury, to invade their province in this respect.<sup>2</sup> Thus, where the court stopped the cross-examination of a witness, saying, in

<sup>1</sup> Union Ry. &c. Co. v. Kallaher 59 Wis. 57. Compare Lynch v. Pyne, (Ill.), 2 N. E. Rep. 77; Nat. Bank v. 52 How. (N. Y.) Pr. 435.  
Mills (N. Y.), 2 N. E. Rep. 27; Moore v. State, 68 Ala. 380;  
v. State, 68 Ala. 380; Moore v. Jones, Clevinger v. Curry, 81 Ill. 432,  
13 Ala. 296; Western &c. R. R. Co. People v. Mallin, 22 N. W. Rep. 15;  
v. Carlton, 28 Ga. 180; Bowers v. Ex parte Warrick, 73 Ala. 57. Com-  
People, 74 Ill. 418; Stampofski v. pare Mack v. State, 48 Wis. 271  
Stiffens, 79 Ill. 303; Terry v. State, (where "proper instructions" and  
13 Ind. 70; Harrison v. Brock, 1 "cautions" are said to be proper),  
Munf. (Va.) 22; Mechelke v. Bramer, and Gibson v. Troutman, 9 Ill. App.

the presence of the jury, "I have serious doubts whether that witness ought not to be recognized to answer for perjury," this was held error.<sup>1</sup> The jury may base their estimate of a witness' credibility on immaterial as well as material facts,<sup>2</sup> or judge of it from his manner; but they should not reject him arbitrarily.<sup>3</sup> And the credibility of experts is as much within their province as that of any other witnesses.<sup>4</sup>

On the other hand, if the facts depend entirely upon the testimony of an uncorroborated witness, whose credibility is plainly impeached, the jury are morally bound to disregard his testimony.<sup>5</sup>

§ 181. **How far Dependent on Means of Knowledge or Recollection.**—It is true, as a general rule, that where an unimpeached witness swears to a fact as of his own knowledge, he must be deemed to possess competent means of information and knowledge of the fact, unless the contrary appears.<sup>6</sup> But a witness who swears positively to facts not within his actual knowledge, *e.g.*, the act of another not done in his presence, is not worthy of belief, in the absence of explanation as to how he acquired his positive knowledge of the facts sworn to;<sup>7</sup> and the rule is the same where facts thus sworn to were of no concern to the witness, and happened many years before, during his childhood.<sup>8</sup> Swearing positively, from mere memory, after the lapse of several years, to such facts as dates,<sup>9</sup> will seriously impair the credibility of a witness, while confusion and uncertainty in his testimony respecting dates will not have that effect in such cases.<sup>10</sup>

94 (where some restriction is placed upon the jury as to what witnesses to believe or disbelieve). See also *Engmann v. Immel*, 59 Wis. 249.

<sup>1</sup> *Kinner v. State*, 45 Ind. 175.

<sup>2</sup> *Paton v. Stewart*, 78 Ill. 481; *Wallace v. State*, 28 Ark. 531; *Shel-labarger v. Nafus*, 15 Kan. 547; *Hol-loway v. Commonwealth*, 11 Bush (Ky.) 344.

<sup>3</sup> See *City Bank of Macon v. Kent*, 57 Ga. 253; *Jones v. State*, 48 Ga. 163; *Evans v. George*, 80 Ill. 51; *Smith v. Grimes*, 43 Iowa, 357; *Green v. Cochran*, 43 Iowa, 545; *Chester v. State*, 1 Tex. App. 702; *State v. Smallwood*, 75 N. C. 104.

<sup>4</sup> *Eggers v. Eggers*, 57 Ind. 461.

<sup>5</sup> *Dunlap v. Patterson*, 5 Cow. (N. Y.) 243, 246. S. P., *Newell v. Wright*, 8 Conn. 323.

<sup>6</sup> *Kottwitz v. Bagby*, 16 Tex. 656. But see *McNally v. Meyer*, 5 Ben. (U. S.) 239.

<sup>7</sup> *Slade v. Joseph*, 5 Daly (N. Y.) 187. But see also *Willey v. Portsmouth*, 35 N. H. 303.

<sup>8</sup> *Chandler v. Hough*, 7 La. Ann. 441; *Parker v. Chambers*, 24 Ga. 518.

<sup>9</sup> *Willett v. Fister*, 18 Wall. (U. S.) 91.

<sup>10</sup> *Black v. Black*, 38 Ala. 111.



But imperfect recollection of some things is not fatal to the credit of the witness as respects other things which he does remember.<sup>1</sup> A witness, however, who pretends to forget circumstances collateral to his main story, which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief.<sup>2</sup>

The duty of the jury is, to regard the capacity of the witness, whether he was able to see and understand the transaction, and also whether he was attentive or careless, prejudiced or dispassionate, or whether he has some sinister motive that might lead him to fabricate that which he did not see.<sup>3</sup> The words he uses are to be taken in their ordinary meaning, and, when testifying to a fact necessarily within his knowledge, the evidence may go to the jury, notwithstanding he fails to affirm positively that the thing is or is not so.<sup>4</sup>

But a wide distinction should be made between witnesses who have an opportunity of knowing whether a fact has or has not occurred, and those who express a mere opinion based upon appearances or so-called results. The testimony of one of the former is worth that of a dozen of the latter.<sup>5</sup>

§ 182. ——— or on the **Character and Conduct of the Witness.**

(1) *Character.* If by reason of the bad character of a witness he is found unworthy of belief, his testimony may be disregarded,<sup>6</sup> and the occupation of a witness may always be shown for the purpose of affecting his credibility.<sup>7</sup> But after all, the jury are the judges, and even where it is shown that a witness has a bad reputation for truth, his evidence is not necessarily destroyed, but is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to.<sup>8</sup> A belief in

<sup>1</sup> *Jackson v. McVey*, 18 Johns. (N. Y.) 330; *supra*, § 10; *State v. Cowan*, 7 Ired. (N. C.) L. 239.

<sup>2</sup> *Gibbons v. Potter*, 3 Stew. (N. J.) 204.

<sup>3</sup> *People v. Bodine*, 1 Edm. (N. Y.) Sel. Cas. 36.

<sup>4</sup> *Hammock v. McBride*, 6 Ga. 178.

<sup>5</sup> *Malin v. Malin*, 1 Wend. (N. Y.) 623, 659.

<sup>6</sup> *Donohue v. Henry*, 4 E. D. Smith. (N. Y.) 102; *Kittering v. Parker*, 8 Ind. 44.

<sup>7</sup> *United States v. Duff*, 19 Blatchf. (U. S.) 9, where he was shown to be a lottery dealer.

<sup>8</sup> *State v. Miller*, 53 Iowa, 209. And see *Brown v. State*, 18 Ohio St. 496; *People v. Robles*, 34 Cal. 591.

spiritualism will not impair the credibility of a witness,<sup>1</sup> nor will the fact that he is a clergyman increase it.<sup>2</sup> Even conviction of crime is only a circumstance for the jury to consider, and to which they are to give what weight they see fit, in estimating the value of the witness' testimony.<sup>3</sup> So also, in the case of an unchaste woman, her loose character affords no argument against her credibility as a witness,<sup>4</sup> though, in some cases, her testimony should be received with caution, and may require corroboration.<sup>5</sup> Even a common prostitute is competent, and may be reliable; whether she is so or not, is for the jury to judge, taking the habits of the woman and all the circumstances into consideration.<sup>6</sup>

(2) *Conduct*. Sometimes the conduct of a witness, at or previous to the trial, is an important factor in getting at the weight of his testimony. Thus, if a previous quarrel between him and a party be shown, this may be considered by the jury,<sup>7</sup> as may also his complicity in the offence on trial,<sup>8</sup> or his betrayal on the witness stand, of a secret so long kept undivulged as to almost render him a *particeps criminis*.<sup>9</sup> So a person in charge of a canal-lock, who had been arrested for his careless conduct, was heard with suspicion when, upon a repetition of such conduct, he endeavored to cast the blame upon the person complaining.<sup>10</sup> And a witness who refused to show his books of account already in court, after testifying by the aid of an alleged memorandum therefrom, was held thereby to subject his testimony to suspicion.<sup>11</sup> An attempt by one witness to bribe another renders the former unworthy of belief without corroboration.<sup>12</sup>

The intoxicated condition of a witness at the time of his

<sup>1</sup> *Blaisdell v. Raymond*, 9 Abb. (N. Y.) Pr. 178 n.

<sup>2</sup> *Sneed v. Creath*, 1 Hawks (N. C.) 309.

<sup>3</sup> *People v. McLane*, 60 Cal. 412. And see *Commonwealth v. Gorham*, 99 Mass. 420.

<sup>4</sup> *State v. Larkin*, 11 Nev. 314; *Jones v. State*, 13 Tex. 168.

<sup>5</sup> *Frazer v. People*, 54 Barb. (N. Y.) 306; *Anonymous*, 17 Abb. (N. Y.) Pr. 48.

<sup>6</sup> *State v. Shields*, 45 Conn. 256. S. P., *State v. Randolph*, 24 Conn.

363; *Smithwick v. Evans*, 24 Ga. 461; *Craft v. State*, 3 Kan. 450; *Anonymous*, 17 Abb. (N. Y.) Pr. 48.

<sup>7</sup> *Breen v. People*, 4 Park. (N. Y.) Cr. 380.

<sup>8</sup> *Moses v. State*, 58 Ala. 117. See also *Borton v. Borton*, 48 Iowa, 697.

<sup>9</sup> *Miller v. Miller*, 5 C. E. Gr. (N. J.) 216.

<sup>10</sup> *Sipple v. State*, 1 N. E. Rep. 892.

<sup>11</sup> *Davie v. Jones*, 68 Me. 393. See also *McMaster v. Stewart*, 11 La. Ann. 546.

<sup>12</sup> *Smith v. Newton*, 84 Ill. 11.

production to testify, undoubtedly affects, if it does not destroy his credibility, and it is for the jury to decide whether he is in such a condition or not.<sup>1</sup> But his having been in that state at the time of an occurrence in regard to which he testifies does not destroy his credibility. It undoubtedly impairs it; but if his evidence is corroborated, or his memory of the transaction appears to be distinct and clear, he is entitled to belief.<sup>2</sup>

If a witness, after partial examination, leaves the courtroom and wilfully remains away, for the purpose of avoiding further examination, his testimony already given should be suppressed, as unworthy of belief;<sup>3</sup> but the fact that he left court after his examination, and that an attachment issued against him is returned "not found," does not, as a presumption of law, necessarily prejudice his credibility, as raising a presumption that he avoided further examination.<sup>4</sup>

§ 183. ——— or his **Manner and Appearance**. — The manner and deportment of witnesses is very commonly an important indication of the existence or the want of sincerity. It is peculiarly the province of the jury to judge of these matters, and they should take into consideration the fact that to some witnesses this public appearance is a matter of indifference, while by many it is regarded with an apprehension productive of embarrassment and agitation, which to unskilful observers may appear the result of insincerity. If the witness testifies to facts incoherently and inconsistently, it has been held that this goes to his credibility, and that if his manner is very incoherent or inconsistent, the testimony should be considered with great caution.<sup>5</sup> But to the writer's mind, the first duty of the jury in such a case would be to endeavor to discover the cause of the incoherence or inconsistency of the witness; *i.e.*, whether it be caused by nervousness merely, or by favoritism to one side of the issue or intent to give false or misleading testimony. In any event the presiding judge should not give to the jury his own individual estimate of the appearance and manner of the witness.<sup>6</sup>

<sup>1</sup> State v. McNinch, 12 So. Car. 89.

<sup>4</sup> Coughlin v. People, 18 Ill. 206.

<sup>2</sup> State v. Castello, 17 N. W. Rep. 605.

<sup>5</sup> Evans v. Lipscomb, 31 Ga. 71.

<sup>3</sup> Flavell v. Flavell, 5 C. E. Gr. Co., 76 N. C. 320. (N. J.) 211.

<sup>6</sup> Crutchfield v. Richmond &c. R. R.

§ 184. ——— or his Bias or Interest. — Notwithstanding the general rule that when a witness testifies positively to a fact, and his testimony is uncontradicted and unimpeached, it is to be credited, an exception exists where the interest of the witness is likely to affect his credibility, and especially where his testimony, if believed, would shield him from a charge of crime. In such a case, his testimony should be submitted to the jury in like manner as if it had been contradicted.<sup>1</sup> So also, where such a witness, testifying under circumstances calculated to create a strong bias, states what is, in its nature, incredible: in such a case his testimony is not necessarily to be credited.<sup>2</sup> But only the *credibility* of the witness is affected,—not his *competency*,<sup>3</sup>—and the jury alone are the judges how far he is worthy of belief; for the court to instruct them to disregard his testimony,<sup>4</sup> or to say to them that a witness' testimony is entitled to greater weight when against than when in favor of himself,<sup>5</sup> or that his being interested tends to discredit him,<sup>6</sup> is reversible error.

§ 185. ——— or Relationship to Party calling him. — It has been laid down in one jurisdiction, that near relationship of witnesses to parties litigant affects their credibility,<sup>7</sup> but the better opinion is that there is no rule of law requiring the testimony of the relative of a party to be viewed with suspicion; its credibility is for the jury,<sup>8</sup> especially in doubtful cases. And where the witness swears positively, and is unimpeached, his credit ought not to be destroyed on that ground.<sup>9</sup> Instructions to disregard his testimony are erroneous.<sup>10</sup>

<sup>1</sup> *Wohlfahrt v. Beckert*, 92 N. Y. 490; s. c. 12 Abb. (N. Y.) N. Cas. 478; *Robinson v. New York Central &c. R. R. Co.*, 20 Blatch. (U. S.) 338.

<sup>2</sup> *United States v. Borger*, 7 Fed. Rep. 193.

<sup>3</sup> *Newhall v. Jenkins*, 2 Gray (Mass.) 562.

<sup>4</sup> *Commonwealth v. Putnam*, 2 Allen (Mass.) 301; *Dailey v. State*, 28 Ind. 285.

<sup>5</sup> *Douglas v. Fullerton*, 7 Ill. App. 102.

<sup>6</sup> *Pratt v. State*, 56 Ind. 179. S. P., *Veatch v. State*, Id. 584.

<sup>7</sup> *Ward v. Valentine*, 7 La. Ann. 184; *Tardiff v. Baudoin*, 9 Id. 127.

<sup>8</sup> *Kan. Pac. R'y Co. v. Little*, 19 Kan. 267.

<sup>9</sup> *Gangwere's Estate*, 14 Pa. St. 417.

<sup>10</sup> *Potts v. House*, 6 Ga. 324.

For applications of these principles to the testimony of the *wife* of a party, see *State v. Guyer*, 6 Iowa, 263; *State v. Rankin*, 8 Id. 355; *State v. Bernard*, 45 Id. 234. Of the *parent* or *child* of a party, see *People v. Austin*, 2 Edm. (N. Y.) Sel. Cas. 54; *Kavanagh v. Wilson*, 70 N. Y. 177.

§ 186. **Credibility of Parties in Civil Actions.** — Another exception to the general rule that the testimony of an unimpeached and uncontradicted witness cannot be disregarded by the court and jury, is that where the witness is a party to the suit his credibility is always a question for the jury, who may, if they see fit, find a verdict against his uncontradicted evidence.<sup>1</sup> They are no more bound to believe what he says on the cross, than what he says on the direct examination.<sup>2</sup> Thus, the issue being infancy, the jury are not bound to believe the testimony of a party as to his own age.<sup>3</sup> The jury only, however, and not the court, may discard a party's testimony as unworthy of belief.<sup>4</sup> His testimony goes to the jury as evidence, not as an admission of facts.<sup>5</sup> But the adverse party is entitled to an instruction that in weighing the credibility of the witness, the jury should take into consideration his position as a party to the suit.<sup>6</sup>

In no event should a presumption be made against him because he does not testify for himself. Various motives may influence a party to forego becoming a witness in his own behalf, besides the consciousness that the facts within his knowledge, if disclosed, would make against his own side of the case, and in favor of that of his adversary.<sup>7</sup>

§ 187. — **of Agents and Servants.** — The servants or agents of a party are competent witnesses for him, as we have heretofore seen,<sup>8</sup> and the amount of credit to be given to their testimony is a question for the jury, and the jury only, to pass upon. The court has no right to instruct them, or even to suggest to them that such witnesses have any such interest as will affect their testimony.<sup>9</sup> In Louisiana,

<sup>1</sup> *Nicholson v. Conner*, 8 Daly (N. Y.) 212; *Laramore v. Minish*, 43 Ga. 282.

<sup>2</sup> *Bridger v. Walker*, 40 Tex. 135.

<sup>3</sup> *Klason v. Rieger*, 22 Minn. 59.

<sup>4</sup> *Prowattain v. Tindall*, 80 Pa. St. 295.

<sup>5</sup> *Matthews v. Story*, 54 Ind. 417.

<sup>6</sup> *Hill v. Sprinkle*, 76 N. C. 353.

<sup>7</sup> *Lowe v. Massey*, 62 Ill. 88.

As to the credibility of a party when called as a witness by the adverse party, see *Darling v. Hurst*, 39 Mich. 765; *Roberts v. Gee*, 15 Barb.

(N. Y.) 449; *Lights'* appeal, 24 Pa. St. 180; *Dravo v. Fabel*, 25 Fed. Rep. 116.

Whether the interposing by a defendant of a legal, though immoral defence; *e.g.*, that his purchase of the liquors sued for was unlawful, will impair his credit as a witness, see *Husted v. O'Donnell*, 118 Mass. 424.

<sup>8</sup> *Supra*, §§ 73, 76.

<sup>9</sup> *Marquette &c. R. R. Co. v. Kirkwood*, 45 Mich. 51.

however, it is held that in actions against common carriers for injury to goods delivered, though the court will not disregard, still it will receive with allowance, the testimony of their servants.<sup>1</sup>

But the jury may consider the fact that the relation of employer and employé existed between a witness and a corporation that is defendant in the action, to see if, from his manner in testifying, such relation influenced his testimony, and determine what effect is to be given to his testimony.<sup>2</sup>

§ 188. ——— of **Accomplices**.—Accomplices being competent witnesses, it appears to follow, as a necessary consequence, that if the jury believe their testimony, the prisoner may be legally convicted upon it, without extrinsic confirmation; and it is accordingly well settled by a long line of decisions both in England and America, that a conviction obtained upon the uncorroborated testimony of an accomplice is strictly legal.<sup>3</sup> But bearing in mind the situation of the witness, his testimony ought always to be received with great jealousy and caution. He gives it under the strongest inducements to deceive, and it is to be scanned by the jury with severe scrutiny, in view of the peculiar circumstances surrounding the witness.<sup>4</sup> The question of credibility should, in such cases, be submitted to the jury with proper instructions<sup>5</sup> as to such surrounding circumstances;<sup>6</sup> or the court may tell them, in a proper case that the witness' testimony is not to be regarded, unless confirmed, in some part

<sup>1</sup> *Bond v. Frost*, 8 La. Ann. 297.

<sup>2</sup> *Illinois Cent. R. Co. v. Haskins*, (Ill.) 2 N. E. Rep. 654.

<sup>3</sup> *English cases*. *R. v. Atwood*, Leach C. C. 521; *R. v. Durham*, Id. 538; 1 Hale P. C. 303; *R. v. Dawber*, 3 Stark. 34; *R. v. Jarvis*, 2 M. & Rob. 40. See also *R. v. Jones*, 2 Campb. 132; 31 How. St. Tr. 325; 7 T. R. 609; *R. v. Hastings*, 7 Car. & P. 152.

*American cases*. *People v. Dyle*, 21 N. Y. 578; *Ulmex v. State*, 14 Ind. 52; *Stocking v. State*, 7 Ind. 326; *Commonwealth v. Grant*, Thach. (Mass.) Cr. Cas. 438; *George v. State*, 39 Miss. 570; *Coats v. People*, 4 Park. (N. Y.) Cr. 662; *Wixson v. People*, 5 Id. 119; *Allen v. State*, 10 Ohio St. 287; *State*

*v. Brown*, 3 Strobb. (S. C.) 508; *People v. Gibson*, 53 Cal. 601; *State v. Russell*, 33 La. Ann. 135; *State v. Litchfield*, 58 Me. 267; *White v. State*, 52 Miss. 216; *Royal Ins. Co. v. Noble*, 5 Abb. (N. Y.) Pr. n. s. 54; *State v. Potter*, 42 Vt. 495; *State v. Betsall*, 11 W. Va. 703.

<sup>4</sup> *People v. Haynes*, 55 Barb. (N. Y.) 450; s. c., 38 How. Pr. 369; *People v. Hare* (Mich.) 24 N. W. Rep. 843; *White v. State*, 52 Miss. 216; *Fitzcox v. State*, Id. 923; *State v. Jones*, 64 Mo. 391. Compare *Irvin v. State*, 1 Tex. App. 301.

<sup>5</sup> *State v. Litchfield*, 58 Me. 267.

<sup>6</sup> *State v. Hing*, 16 Nev. 307.

of it at least, by unimpeachable evidence;<sup>1</sup> or that they are to receive his testimony and give it the same effect as that of any other witness, so far as they believe him.<sup>2</sup> But such instructions can only be given in jurisdictions where the judge is at liberty to advise the jury upon the evidence,<sup>3</sup> and even then a refusal to instruct them not to convict without corroboration is not reversible error.<sup>4</sup>

On the other hand, the rule in New York is, that inasmuch as verdicts rendered upon the uncorroborated evidence of confederates are of doubtful propriety, they will not, in general, be allowed to stand if the witness be otherwise impeached;<sup>5</sup> and in Wisconsin, in such cases, the presiding judge is clothed with discretion to direct an acquittal or not, as he sees fit—his refusal to do so, or to set aside the verdict affording no ground for reversal.<sup>6</sup> The statute books of many of the states contain the existing rule upon this subject, and it will also be further examined when we come to consider the cases upon the subject of the corroboration of witnesses sought to be impeached.<sup>7</sup>

§ 189. ——— of Spies and Informers. — This class of witnesses cannot be said to come within the description of accomplices so as to be discredited as such, although, perhaps, on other grounds, no small degree of prejudice or disfavor may attach to them. Whatever may be the merit or demerit of their conduct, they are not, strictly speaking, accomplices.<sup>8</sup> Thus it has been held that “spies and informers are not odious to the law, nor is their evidence to be discredited as coming from that source.”<sup>9</sup> And a detective who joins a criminal organization for the purpose of exposing it, and bringing criminals to punishment, and who honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counselled

<sup>1</sup> *United States v. Kessler*, Baldw. (U. S.) 22.

<sup>2</sup> *Sinclair v. Jackson*, 47 Me. 102.

<sup>3</sup> *State v. Betsall*, 11 W. Va. 703, which he cannot do in West Virginia.

<sup>4</sup> *State v. Potter*, 42 Vt. 495.

<sup>5</sup> *People v. Haynes*, 55 Barb. (N. Y.) 450; s. c. 38 How. Pr. 369.

<sup>6</sup> *Black v. State*, 16 Chic. L. N. 202; s. c., 6 Wis. Leg. News, No. 131.

<sup>7</sup> *Infra*, Chap. XVI.

<sup>8</sup> The question of the effect of the expectation of reward or share in the penalty, upon their competency, has already been considered. *Supra*, § 75.

<sup>9</sup> *Town of St. Charles v. O'Malley*, 18 Ill. 407.

A “spotter” is not an accomplice. *State v. Hoxsie*, (R. I.) 1 East. Rep. 441; nor is a private detective, *De Long v. Giles*, 11 Ill. App. 33.

parties who were about to commit crime, if in so doing he intended that they should be discovered and punished. His testimony, therefore, is not to be treated as that of an infamous witness;<sup>1</sup> and an instruction to the jury that the testimony of such a witness should be looked upon with suspicion, is erroneous.<sup>2</sup>

§ 190. — of Defendants in Criminal Cases. — (1) *In general.* Where, taking advantage of the provisions of the statutes enabling accused persons to testify, a defendant in a criminal case goes upon the witness-stand, his testimony is subject to the like tests, for the purpose of determining the reliance to be placed upon it, as that of other witnesses. In all cases the interest or bias which may sway a witness to pervert the truth, may be taken into consideration for the purpose of determining what credit shall be given to his evidence.<sup>3</sup> "Such a person, when introduced as a witness in his own behalf, is to be examined and cross-examined precisely as other witnesses; and he may likewise be impeached in precisely the same mode. The accused, as a witness, differs from other witnesses only in the fact that he is the defendant charged and being tried for crime, which may be taken into consideration by the jury in passing on his credibility; but his testimony must be treated the same as that of any other witness; nor can it be treated, as a matter of law, as not having the same effect and weight

<sup>1</sup> *Campbell v. Commonwealth*, 84 Pa. St. 187. S. P., *People v. Barrie*, 49 Cal. 342; *Wright v. State*, 7 Tex. App. 574.

<sup>2</sup> *De Long v. Giles*, 11 Ill. App. 33. But see *Commonwealth v. Downing*, 4 Gray (Mass.) 29, where it is held that while one who purchases intoxicating liquor, sold contrary to law, for the express purpose of prosecuting the seller for an unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller, still the jury should be instructed to receive his evidence with the greatest caution and distrust; and *Anonymous*, 17 Abb. (N. Y.) Pr. 48, where it is said that the testimony of a witness, employed to watch and detect a husband or wife suspected of adultery, though it is competent, and ought not

to be absolutely rejected, is to be received with great caution, and scrupulously and minutely scrutinized.

<sup>3</sup> *Chambers v. People*, 105 Ill. 409. S. P., *State v. McGinnis*, 76 Mo. 326; *State v. Sanders*, Id. 35. Where there was no conflict as to the fact of the homicide by the defendant, but the defendant, who was examined in his own behalf, and who was the only eye-witness of the transaction, testified to facts which would amount to justification; and it was claimed, he being the only witness, that the evidence did not justify the verdict, it was held it was for the jury to determine how much of the statement of the defendant they should believe, and how far it would carry conviction to their minds. *People v. Strange*, 61 Cal. 496.



as that of other witnesses. Whether it should or not is a question of fact for the jury to decide, and this is the rule in regard to all the other witnesses.”<sup>1</sup> The jury may wholly disregard it if, from the entire evidence, they believe it to be untrue; and they are at liberty, if they believe it to be true, to give it credence and weight, and act upon it to the extent of his acquittal.<sup>2</sup> But however incredible his story may be, he is entitled to an instruction to the jury, based upon the hypothesis that it is true,<sup>3</sup> and it is error for the trial court to refuse to permit his counsel to comment upon it in his address to the jury.<sup>4</sup>

(2) *Instructions of the court as to defendant's testimony.* As a general rule, the presiding judge in a criminal case should abstain, in his charge to the jury, from commenting upon the weight of defendant's testimony. The credit to be given to it “should be left (where the statute places it) solely with the jury.”<sup>5</sup> But this rule has not been adhered to by the courts. Thus, in one case, a charge to the jury in respect to the weight and effect proper to be given to defendant's evidence, that “in addition to noticing his manner, the

<sup>1</sup> *Chambers v. People*, *supra*. *Contra*, as to the last point, *State v. Cooper*, 71 Mo. 426, where it is said that it cannot be declared, as a matter of law, that the testimony of a defendant on a criminal trial, is entitled to the same weight as it would be if he were testifying for himself in a civil suit.

<sup>2</sup> *Bartholomew v. People*, 104 Ill. 601. In *People v. Morow* (60 Cal. 142) the following instruction was held proper: “The defendant has offered himself as a witness, on his own behalf, on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and probability of his statements, taken in connection with the evidence in the cause, you should consider his relations and situation under which he gives his testimony, the consequence to him relating from the results of this trial and the inducements and stipulations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to

which his evidence is entitled, if convincing and carrying with it a belief in its truth, to act upon it; if not, you have a right to reject it;” the court holding that the defendant, in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness. “It is only by virtue of a provision of the code that he is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected. It is not error, therefore, for the court to call the attention of the jury to that circumstance, and we see no error in the instruction complained of.” To the same effect see *State v. Maguire*, 69 Mo. 197; *Duffin v. People*, 107 Ill. 113; *Beasley v. State*, 71 Ala. 328; *Blackburn v. State*, *Id.* 319; *United States v. Borger*, 19 Blatchf. (U. S.) 249.

<sup>3</sup> *People v. Keefer*, 2 West Coast Rep. 878.

<sup>4</sup> *Beasley v. State*, 71 Ala. 328.

<sup>5</sup> *State v. Stewart*, 9 Nev. 120.

probability of his statements, taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, and the consequences to him relating from the results of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. . . . If convincing and carrying with it a belief in its truth, act upon it, if not, you have a right to reject it," was sustained.<sup>1</sup> In another, the defendant asked, but was refused the instruction "that the testimony of defendant, Cooper, in his own behalf, has as much credibility attached to it as if he were testifying in a similar manner in a civil case, and his truthfulness or untruthfulness should be tested in the same way as any other witness." The jury had previously been told that "they are the sole judges of the credibility of witnesses, and in passing upon the credit to be given any witness (defendant included), they may take into consideration the means of knowledge, the relation to the transaction, and the interest of the witness." And this was held correct.<sup>2</sup> In Massachusetts, where defendant requested an instruction that the presumption was in favor of his veracity, like any other witness, but the judge refused and instructed the jury that there was no presumption either way as to the truthfulness of a defendant's testimony, and that it was to be allowed such weight as in their judgment it ought to have, taking all the circumstances of the case and other evidence into consideration, this was held correct.<sup>3</sup>

Where the language of the statute was "the credit to be given to his testimony being left solely to the jury under the instructions of the court," the court held that this did not establish a new rule for defendants in criminal cases, but simply applied to them a rule which exists as to other witnesses; that, in the absence of a request for instruction from either side, the court need not, of its own motion, instruct the jury as to the credit to be given to his testimony.<sup>4</sup>

<sup>1</sup> *People v. Cronin*, 34 Cal. 191. To same effect, *State v. Maguire*, 69 Mo. 197; *State v. Zorn*, 71 Id. 415; *St. Louis v. State*, 8 Neb. 405.

<sup>2</sup> *State v. Cooper*, *supra*; *limiting and explaining*, *State v. Swain*, 68 Mo. 608.

<sup>3</sup> *Com. v. Wright*, 107 Mass. 403.

<sup>4</sup> *People v. Rodundo*, 44 Cal. 538.

In *Creed v. People*, 81 Ill. 565, the court, upon request, charged: "The jury have no right to disregard the testimony of the defendants or either of them through mere caprice or

§ 191. **Rules for Weighing Testimony.**—The jurors being the unfettered, illimitable, and final judges of the credibility of the various witnesses who testify before them, it would seem to follow that no certain rules can be laid down for the weighing of testimony, which would be binding upon them. It is well settled, however, that they cannot act upon their own private knowledge of any fact, for then it could not be known whether the verdict would be for or against the evidence.<sup>1</sup> And whether binding on the jury or not, the fact remains that many so-called rules for weighing testimony have been laid down by the courts, some of them engrafted with so many “exceptions” that but little of the original principle remains. Thus, it has been held to be a general rule that every presumption is in favor of the credibility of an unimpeached (or unsuccessfully impeached) witness;<sup>2</sup> but it is said that the jury should not be instructed as a rule of law to indulge in this presumption; they are to judge of the propriety of so doing in the particular case.<sup>3</sup> If the statements of such a witness are grossly improbable, the jury may disregard his testimony even though uncontradicted and unimpeached.<sup>4</sup> They may take into consideration his opportunity of knowledge, the strength of his memory, his bias, and his manner and appearance while testifying, but an

merely because they are defendants. The law makes them competent witnesses, and the jury are bound to consider their evidence, and are the sole judges of their credibility.” The court modified it by adding: “Yet the jury are under no legal obligation to believe them, if, from all the facts proved in the case, they think their testimony not reliable.” It was held that there was no error in the modification. The degree of credit to which a prisoner examined as a witness is entitled, is to be decided by the jury, and not the court, and it is error for the court to instruct the jury to wholly disregard his testimony when his cross-examination has developed the fact that he had served a term in the state prison for felony. *Newman v. People*, 63 Barb. (N. Y.) 630. In another case, where the court, in referring to the testimony of two defendants

jointly indicted and tried, as witnesses, each in his own behalf, told the jury that they could not believe them both, because they were wholly inconsistent as to the principal facts in the case; it was held there was no error. *State v. McLane*, 15 Nev. 345.

<sup>1</sup> 3 Stark. Ev. 449; 3 Bl. Com. 375. In Texas a criminal conviction was reversed because of the court’s failure to reply to the following question asked by the jury: “Can we judge a witness just by what he says on the stand, and not by what we know of him privately?” *Wharton v. State*, 45 Tex. 2.

<sup>2</sup> *Comstock v. Rayford*, 20 Miss. 369.

<sup>3</sup> *State v. Jones*, 77 N. C. 520.

<sup>4</sup> *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Stilwell v. Carpenter*, 2 Abb. (N. Y.) N. Cas. 238.

instruction by the court that they may disbelieve any testimony which, *under all the circumstances of the case*, is not credible, is too comprehensive, for the jury cannot be allowed to determine for themselves that other circumstances, not within legal contemplation, tending to impeach the witness, show that his evidence is impeached, and therefore entirely disregard it.<sup>1</sup>

The jury may draw an unfavorable inference from the conduct of a party in omitting to testify himself, or to call witnesses present in court, and who have knowledge of material facts.<sup>2</sup> And where they find themselves left in a reasonable and real doubt as to the credibility of a witness, they should disregard his testimony, and give such a verdict as they would have done if he had not been a witness.<sup>3</sup> But the poverty of a witness does not diminish or his wealth increase his credibility;<sup>4</sup> nor is it to be decided by the number of others who may testify for or against it, but by their respectability, intelligence, consistency, and means of information.<sup>5</sup> If a witness admitted to be truthful has been examined at considerable intervals, his earliest answers are to be most relied on, as nearest to the transaction testified about.<sup>6</sup> The foregoing and all other rules as to arriving at a conclusion as to the credibility of witnesses are the same in criminal as in civil cases.<sup>7</sup>

§ 192. **The Maxim "falsus in uno falsus in omnibus."** — In applying this maxim, taken from the civil law, some confusion has arisen in the minds of judges in charging juries. The true rule undoubtedly is, that if a witness *wilfully* and *knowingly* testifies falsely to any material fact in the case, the jury are authorized to discredit and reject the whole of his testimony;<sup>8</sup> and the jury may be so instructed.<sup>9</sup> But the

<sup>1</sup> Hartford Life &c. Ins. Co. v. Gray, 80 Ill. 28. In Georgia, it seems the jury may believe so much of the evidence of a party who is the only witness as supports the case of the opposite party, and disbelieve evidence in rebuttal. Hardee v. Williams, 30 Ga. 921.

<sup>2</sup> Whitney v. Bayley, 4 Allen (Mass.) 173; Perkins v. Hitchcock, 49 Me. 468; Seward v. Garlin, 33 Vt.

583. But see Devries v. Phillips, 63 N. C. 53.

<sup>3</sup> Miller v. Richardson, 2 Ired. (N. C.) L. 250.

<sup>4</sup> Van Duzor v. Allen, 90 Ill. 499.

<sup>5</sup> Kinchelov v. State, 5 Humph. (Tenn.) 9.

<sup>6</sup> Parke v. Foster, 26 Ga. 465.

<sup>7</sup> Lewis v. Lewis, 9 Ind. 105.

<sup>8</sup> State v. Mix, 15 Mo. 153; Gillet v. Wimer, 23 Mo. 77; State v. Schoen-

<sup>9</sup> O'Rourke v. O'Rourke, 43 Mich. 58.

trouble has been that the courts have, in many cases, omitted to tell the jury that such false testimony must be wilfully and knowingly given.<sup>1</sup> The maxim does not apply to false testimony the giving of which may have been caused by a mistake on the part of the witness;<sup>2</sup> nor to cases of mere contradiction.<sup>3</sup> The jury are not *compelled* to disbelieve the witness however false, and wilfully so, his testimony may be in some respects.<sup>4</sup> It is to be suspected, but not necessarily rejected as a whole.<sup>5</sup> He may be corroborated in respect to portions of his testimony;<sup>6</sup> and even in the case of such a witness, the question of credibility remains wholly with the jury,<sup>7</sup> who may, if they choose, yield entire credit to some of his statements and disbelieve others,<sup>8</sup> crediting such part as they may deem auxiliary to the ascertainment of truth.<sup>9</sup>

§ 193. **Positive and Negative Testimony.**—Another general rule for weighing testimony is that the testimony of one witness who speaks positively and affirmatively to a fact is entitled to more consideration than that of several equally credible witnesses who testify negatively only.<sup>10</sup> In other

wald, 31 Mo. 147; Paulette v. Brown, 40 Mo. 52; People v. Soto, 59 Cal. 367; Dell v. Oppenheimer, 9 Neb. 454; Mann v. Arkansas Valley &c. Co., 24 Fed. Rep. 261; Minich v. People, 8 W. C. Rep. 580. Even if the fact be immaterial. Huber v. Teuber, 3 MacArth. (D. C.) 484.

<sup>1</sup> People v. Strong, 30 Cal. 151; Gottlieb v. Hartman, 3 Colo. 53; United States Express Co. v. Hutchins, 58 Ill. 44; Pope v. Dodson, Id. 360; Chicago &c. R. R. Co. v. Boger, 1 Ill. App. 472; Quinn v. Rawson, 5 Id. 130; Swan v. People, 98 Ill. 610; Callanan v. Shaw, 24 Iowa, 441; State v. Peace, 1 Jones (N. C.) L. 251.

<sup>2</sup> State v. Elkins, 63 Mo. 159; Shenuit v. Brueggestradt, 8 Mo. App. 46; Koehucke v. Ross, 16 Abb. (N. Y.). Pr. n. s. 345. See also Taft v. Kyle, 15 Nev. 416.

<sup>3</sup> Galliher v. People, 82 Ill. 145. But the witness must, it seems, have been contradicted, or his falsity will not appear. Swann v. People, 98 Ill. 610.

<sup>4</sup> Pennsylvania Co. v. Conlan, 101

Ill. 93. Compare Deering v. Metcalf, 74 N. Y. 501.

<sup>5</sup> Finley v. Hunt, 56 Miss. 221; People v. Hicks, 53 Cal. 354; People v. Sprague, Id. 491.

<sup>6</sup> Goeing v. Ourhouse, 95 Ill. 346.

<sup>7</sup> Schuek v. Hagar, 24 Minn. 339.

<sup>8</sup> Lewis v. Hodgdon, 17 Me. 267; Blanchard v. Pratt, 37 Ill. 243; Parsons v. Huff, 41 Me. 410; Merrill v. Whitefield, Id. 414; State v. Williams, 2 Jones (N. C.) L. 257.

<sup>9</sup> Mead v. McGraw, 19 Ohio St. 55; *overruling* Stoffer v. State, 15 Id. 47. See also State v. Brantley, 63 N. C. 518; State v. Smith, 8 Jones (N. C.) L. 132; Mercer v. Wright, 3 Wis. 645. The maxim is said not to be a rule of evidence in North Carolina. State v. Spencer, 64 N. C. 316.

<sup>10</sup> Stitt v. Huidekopers, 17 Wall. (U. S.) 384; Kennedy v. Kennedy, 2 Ala. 571; Pool v. Devers, 30 Ala. 672; Todd v. Hardie, 5 Ala. 698; Johnson v. State, 14 Ga. 55; Hepburn v. Citizens' Bank, 2 La. Ann. 1,007; Auld v. Walton, 12 Id. 129; Delk v. State, 3 Head (Tenn.) 79; Jackson v.

words, where one witness swears positively to a fact, and another of equal credibility contradicts it, the jury are not to be instructed that the fact is not proved.<sup>1</sup> In many cases the want of means or opportunity in the witness of knowing the matters in controversy, his actual inattention, the absence of circumstances likely to excite his attention, or the existence of circumstances likely to divert it, are considerations which greatly diminish the effect of negative testimony.<sup>2</sup> But this rule also has its exceptions, real or seeming. Thus where two persons listen with equal attention, and yet contradict each other as to the fact of certain words being spoken, the negative may equal the affirmative testimony.<sup>3</sup> And so it may, when one witness swears he had a certain conversation with another, and that other insists that such conversation never took place. This is a direct contradiction, and the rule does not apply.<sup>4</sup> Inherent improbability, also, in positive testimony will warrant its rejection, whether contradicted or not.<sup>5</sup> And the negative testimony of witnesses familiar with a certain commodity, from long dealing in it, that they never saw any of a specified brand, may be weighed against testimony of another witness, that he had

Loomis, 12 Wend. (N. Y.) 27; Coles v. Perry, 7 Tex. 109; Ralph v. Chicago &c. Ry. Co., 32 Wis. 177; Harris v. Bell, 27 Ala. 520; Matthews v. Poythress, 4 Ga. 287.

<sup>1</sup> Johnson v. Whiddin, 32 Me. 230. Three witnesses swore explicitly to a set of words spoken in a ball-room, where there was a noise from dancing, music, and confusion. Eleven others, who were in the room at the time, testified that they did not hear such words, and that, in their opinion, they should have heard them if uttered. The jury having found against the speaking of the words, a new trial was granted, the court holding the affirmative testimony decisively entitled to the greater weight. Johnson v. Scribner, 6 Conn. 185.

<sup>2</sup> Johnson v. Scribner, *supra*. And see Woodcock v. Bennett, 1 Cow. (N. Y.) 711; and Carroll v. Charter Oak Ins. Co., 1 Abb. (N. Y.) App. Dec. 316. Where S. swore positively that an account was presented by

him to L., who swore that he did not *recollect* or *believe* that it was, credit was given to S. Flood v. Thomas, 5 Mart. (La.) n. s. 560. See also Berg v. Chicago &c. Ry. Co., 50 Wis. 419.

<sup>3</sup> Johnson v. Scribner, 6 Conn. 188, 189, per Hosmer, C. J. See also State v. Gates, 20 Mo. 400.

<sup>4</sup> Reeves v. Poindexter, 8 Jones (N. C.) L. 308.

<sup>5</sup> Blankman v. Vallejo, 15 Cal. 638. In Illinois it is held that the testimony of a witness having a full opportunity of knowing that a person did not strike a blow is affirmative evidence, and entitled to weight as such. Coughlin v. People, 18 Ill. 266. And in Massachusetts it is said that it is not true as a matter of law that negative evidence may not be sufficient in fact to counterbalance the positive testimony of a single witness. Campbell v. New England &c. Ins. Co., 98 Mass. 381.

seen it, in determining whether such brand existed, and was known in the market.<sup>1</sup> So, also, the rule is not applicable where one party to a verbal lease testifies that it did, and the other that it did not, contain a certain grant.<sup>2</sup> Sometimes testimony negative in fact is held to be affirmative within the rule; thus the testimony of persons, who, at the time of an accident at a railroad crossing, were within thirty yards of it, that they were in a situation to have heard a bell ring or whistle sound if there had been any rung or sounded, and that they did not hear any, cannot be regarded as negative testimony.<sup>3</sup>

§ 194. **Conflicting Testimony.** — There is often no certain standard by which the credit of conflicting witnesses can be ascertained. Different courts and juries would entertain different opinions, and each must judge for themselves.<sup>4</sup> The testimony of all the witnesses, in such cases, goes to the jury, who must determine the weight due to each;<sup>5</sup> and this, even though the discrepancy be between witnesses on one side only.<sup>6</sup> It is generally held error for the court to instruct the jury as to the relative credibility of classes of conflicting witnesses, as being an invasion of their province.<sup>7</sup> So held where the court said to the jury, "Both witnesses are gentlemen; it is a matter of memory."<sup>8</sup> But it has been held not to be erroneous for the court to instruct the jury in a case depending on the credibility of witnesses, that the testimony of a witness given in open court, in the presence of the opposite party and the other witnesses, and where the witness is subject to a thorough cross-examination, and where the court or jury have the opportunity of observing his manner, appearance, and conduct, is entitled to greater

<sup>1</sup> *Pollen v. Leroy*, 10 Bosw. (N. Y.) 38.

<sup>2</sup> *Sobey v. Thomas*, 39 Wis. 317.

<sup>3</sup> *Rockford &c. R. R. Co. v. Hillmer*, 72 Ill. 235. See also on this point, *Coughlin v. People*, 18 Ill. 266; and generally, *Bemis v. Becker*, 1 Kan. 226; *State v. Johnson*, 1 Vr. (N. J.) 452.

<sup>4</sup> *People v. Superior Court*, 5 Wend. (N. Y.) 126.

<sup>5</sup> *Doe d. Jones v. Fulgham*, 2 Murph. (N. C.) 364, 367, 368.

<sup>6</sup> *State v. Potts*, 4 Halst. (N. J.) 26,

31, where Ewing, C. J., said, "An indictment does not fall because one witness differs from another in points more or less material, or even in some directly contradicts him." See also *Bradley v. Ricardo*, 8 Bing. 57; *Beauchamp v. Cash, Dowl. & Ry.* N. P. 3.

<sup>7</sup> *Nelson v. Vorce*, 55 Ind. 455.

<sup>8</sup> *McRae v. Lawrence*, 75 N. C. 289. See also *Whitten v. State*, 47 Ga. 297; *Johnson v. New York &c. R. R. Co.*, 39 How. (N. Y.) Pr. 127.

weight than the evidence of a witness embodied in a deposition, taken in private, and remote from the court and jury, and where all the ordinary tests of truth cannot be applied.<sup>1</sup>

So, also, the witness whose position gave him the best opportunity for observance and knowledge is to be given the greater credit in cases of conflict of evidence.<sup>2</sup> On this principle, where the testimony was conflicting as to whether a building had been completed according to contract, that of the architect was accorded the greater weight;<sup>3</sup> and where the dispute was as to the proper amount of damages to be assessed for a right of way across a farm, the testimony of farmers was preferred to that of persons engaged in other pursuits.<sup>4</sup>

Again, in a proper case, the jury may take into consideration the appearance on the stand, of the discordant witnesses, their business competency, care, and habits, as disclosed by the evidence;<sup>5</sup> and the fact whether the witnesses on the same side agree, one with another, may be considered.<sup>6</sup> So, also, where two witnesses contradict each other, both having previously given their deposition with regard to the same matter, credit will be given to the one who is sustained by his previous testimony, rather than to him who differs therefrom in material points.<sup>7</sup>

Another rule is that a disinterested witness is entitled to more confidence than an interested or biassed one with whose testimony his own conflicts. This rule is often applied in actions against a master for the negligence of his servants.<sup>8</sup> But the courts are averse to allowing the jury to be instructed upon this point, preferring to leave the propriety of applying the rule to be discovered by the jury, without assistance.<sup>9</sup>

<sup>1</sup> *Carver v. Louthain*, 38 Ind. 530. S. P., *Mathilde v. Levy*, 24 La. Ann. 421.

<sup>2</sup> *Barrett v. Williamson*, 4 McLean (U. S.) 589; *Hitt v. Rush*, 22 Ala. 563; *Durham v. Holeman*, 30 Ga. 619.

<sup>3</sup> *Tucker v. Williams*, 2 Hilt. (N. Y.) 562.

<sup>4</sup> *Jacksonville &c. R. R. Co. v. Caldwell*, 21 Ill. 75. But in *Phillips v. Williams*, an instruction that as between several witnesses, the one

who had most *interest* in noticing and remembering the facts as to which he has testified, should be preferred, was disapproved. 39 Ga. 597, 603.

<sup>5</sup> *First Nat. Bank v. Haight*, 55 Ill. 191. (A suit against a bank for an alleged error of the paying teller.)

<sup>6</sup> *The Petrel*, 1 Newb. Adm. 45.

<sup>7</sup> *The Indiana*, 1 Newb. Adm. 115.

<sup>8</sup> *Chicago &c. R. R. Co. v. Triplett*, 38 Ill. 482.

<sup>9</sup> The court instructed the jury that



Another rule, to be received under many qualifications and applied with great caution, is, that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony.<sup>1</sup> So the testimony of one of two contradictory witnesses, who is fully sustained in respect to facts of which other witnesses are cognizant, will be credited; and that of the other, who is contradicted upon important and material facts by the unimpeached testimony of other witnesses will be disregarded.<sup>2</sup>

Where the conflicting witnesses are equally positive, intelligent, and candid,<sup>3</sup> are alike unimpeached, and have equal opportunities of obtaining information, the testimony of the greater number — the preponderance of evidence — must prevail;<sup>4</sup> and the same is the rule where circumstances of suspicion attach to the credit of the witnesses on both sides.<sup>5</sup> But it has been said that the preponderance of testimony before a jury, in a civil case, does not depend merely upon the number of witnesses.<sup>6</sup>

Where the parties to the suit, testifying each in his own behalf, contradict each other, the jury are to determine which one should be believed.<sup>7</sup> It is error to withhold from them the question of relative credibility in such a case,<sup>8</sup> or to instruct them to find for one side or the other.<sup>9</sup> But where

when two witnesses swear differently, and one is a disinterested witness, and the other a party to the suit, then, other things being equal, the evidence of the disinterested witness should prevail over that of the party to the suit. It was held that this language, though not approved, would not justify a reversal of judgment. *Sullivan v. Collins*, 18 Iowa, 228. In another case, it is said that an instruction that "testimony of witnesses who have no interest in the result of the suit, of equal credibility otherwise, is entitled to more weight than the testimony of interested witnesses," is not erroneous, but is better withheld. *Bonnell v. Smith*, 53 Iowa, 281. And in another, it was held reversible error to charge the jury, with reference to a defendant who had testified in his own behalf, that "one interested will

not usually be as honest and candid as one not so." *Greer v. State*, 53 Ind. 720.

<sup>1</sup> *The Santissima Trinidad*, 7 Wheat. (U. S.) 283.

<sup>2</sup> *Fox v. Matthews*, 33 Miss. 433.

<sup>3</sup> *Townsend Manuf. Co. v. Foster*, 51 Barb. (N. Y.) 346.

<sup>4</sup> *Vaughan v. Parr*, 20 Ark. 600; *Dowdell v. Neal*, 10 Ga. 148.

<sup>5</sup> *The Napoleon*, Olc. Adm. 208.

<sup>6</sup> *McLees v. Felt*, 11 Ind. 218.

<sup>7</sup> *Stampofski v. Steffens*, 79 Ill. 303; *Stilwell v. Carpenter*, 2 Abb. (N. Y.) N. Cas. 238; *Moody v. Pell*, Id. 274. *S. P.*, *Haines v. People*, 82 Ill. 430.

<sup>8</sup> *Lawrence v. Maxwell*, 58 Barb. (N. Y.) 511.

<sup>9</sup> *Delvee v. Boardman*, 20 Iowa, 446. See also *Wiley v. Gatling*, 70 N. C. 410.

there are no witnesses other than the parties, and the defendant denies all the facts stated by the plaintiff, this, it has been held, leaves the case as if no testimony had been offered by the plaintiff.<sup>1</sup> In such a case there is no preponderance of evidence in plaintiff's favor, without which he cannot recover.<sup>2</sup> But in case one of them be corroborated, *e.g.*, by documentary evidence, such as the production by plaintiff, uncanceled, of the notes sued on, this should turn the scale in his favor.<sup>3</sup>

§ 195. **When One Witness is Sufficient.** — As a general rule, courts and juries ought not to weigh evidence by the number of witnesses testifying on each side. The evidence of one witness, even though a party, may have more weight in the decision than the testimony of a dozen adverse witnesses. If testimony of different witnesses cannot be harmonized, the court or jury trying the cause must determine which of the witnesses are the more worthy of belief.<sup>4</sup> Thus, the affirmative of an issue may be found, notwithstanding there be but one witness on each side, and the evidence be conflicting.<sup>5</sup> No matter how much the presiding judge may doubt the truth of a party's sole witness, he must leave the question of credibility wholly with the jury.<sup>6</sup>

<sup>1</sup> *Anderson v. Collins*, 6 Ala. 783.

<sup>2</sup> *Sanborn v. Babcock*, 33 Wis. 400.

<sup>3</sup> *Steumbaugh v. Hallam*, 48 Ill. 305. See also, generally, *Hobbs v. Davis*, 30 Ga. 423; *McCullough v. McCullough*, 12 Ind. 487.

<sup>4</sup> *Rudolph v. Lane*, 57 Ind. 115.

<sup>5</sup> *Riley v. Butler*, 36 Ind. 51.

<sup>6</sup> *Leibig v. Steiner*, 94 Pa. St. 466.

In the following instances one witness has been held sufficient: —

To authorize the recovery of usury paid to a testator, against the denial of the executor, who was not presumed to have personal knowledge on the subject. *Proctor v. Terrell*, 8 B. Mon. (Ky.) 451.

To establish plaintiff's case, as against the denial in the answer of a material fact. *Enders v. Williams*, 1 Metc. (Ky.) 346; or even where there are circumstances creating suspicion against an account sued on. *Ford v. Haskell*, 32 Conn. 489.

To prove that the witness received certain bank-bills in a neighboring State, and that they were bills of banks there, to show the bills to be of value, and current in State of the forum. *Commonwealth v. Stebbins*, 8 Gray (Mass.) 492.

To prove an act of adultery, in order to sustain a decree of divorce. But, in such a case, the conclusion must depend upon the probability of the story, the character of the witness, and the consistency of his evidence, and perhaps, also, somewhat on the character of the defendant. *Derby v. Derby*, 6 C. E. Gr. (N. J.) 36.

On the other hand the unsupported testimony of a single witness has been held insufficient: —

Where he testifies to admissions obtained by him from a party for the purpose of charging him thereby. *Sunday v. Gordon, Blatch. & H.* (U. S.) 569.

To sustain an action against one summoned as trustee in foreign attachment, for answering falsely in his examination under oath, the rule being the same in such a case as in a prosecution for perjury. *Laughran v. Kelly*, 8 Cush. (Mass.) 199.

Where he testifies from recollection, merely, after the lapse of seventeen years. *Ridley v. Ridley*, 1 Coldw. (Tenn.) 323.

Where, being called to prove fraud, he testifies to a conversation in which he did not participate, when his attention was not requested or particularly attracted to it. *Hall v. Layton*, 16 Tex. 262.

Where he came to testify before a master with a prepared deposition, a part of which had been written by the defendant, requesting him so to testify, and his testimony varied in some material points from that of another witness, although his general character was unimpeached. *McDaniels v. Barnum*, 5 Vt. 279; 6 Vt. 177.

The unsupported testimony of the accused, which the jury do not believe. *Binfield v. State*, 19 N. W. Rep. (Nebr.) 607.

To impeach the character of another witness for truth and veracity. *Wafford v. State*, 44 Tex. 439.

## CHAPTER XIII.

### CONTRADICTING, DISCREDITING, AND IMPEACHING WITNESSES.

- § 196. The Right to contradict or impeach a Witness.
- § 197. Right to impeach Character.
- § 198. Competency of Witness to Character.
- § 199. What Questions may be put to Witness to Character.
- § 200. Sufficiency and Effect of Proof as to Character.
- § 201. Showing Previous Conviction or Prosecution for Crime.
- § 202. Showing Bias or Prejudice.
- § 203. Proof of Contradictory or Inconsistent Statements, generally.
- § 204. Can Former Statement be proved where Witness neither admits nor denies ?
- § 205. Proof of Contradictory Written Statements.
- § 206. Whole Paper need not be shown Witness.
- § 207. Proving Contents of Lost Writing.
- § 208. Cross-Examination as to Previous Statements must show whether they were in Writing or in Words.
- § 209. Contradiction not allowed where Former Statement is Impertinent or Immaterial.
- § 210. Showing Previous Expressions of Opinion Inconsistent with Witness' Testimony.

§ 196. **The Right to contradict or impeach a Witness.**—As a general rule, subject to the exceptions hereafter to be examined, either party to an action at law or suit in equity may, after first cross-examining a witness introduced by the opposite party, impeach, contradict, or discredit such witness either by evidence showing him to be interested or biassed, or to be of bad moral character, or to have previously made statements inconsistent with or contradictory to those made on the trial, or by other proof tending to lessen his credibility with the jury. Thus a party may examine a witness as to the details of his transactions, in order to show his interest, at any stage of the suit.<sup>1</sup> He can contradict the testimony of an adverse witness, if material, even when he cannot impeach his general character.<sup>2</sup> He can always impeach, unless

<sup>1</sup> *Baldwin v. West*, Hard. (Ky.) 50.  
See *Head v. State*, 44 Miss. 731.

<sup>2</sup> *Frank v. Manny*, 2 Daly (N. Y.) 92.

he has introduced new matter in the cross-examination.<sup>1</sup> But it is said a witness cannot be called to impeach the memory, merely, of another witness.<sup>2</sup> Even where, by statute, the oath of a party, *e.g.*, denying usury, cannot be directly contradicted, circumstances may be proved tending to show that the oath was falsely taken.<sup>3</sup> A party to the suit may be impeached in the same manner and on the same grounds as any other witness,<sup>4</sup> and so may a defendant in a criminal prosecution;<sup>5</sup> and an impeaching witness may be himself impeached.<sup>6</sup>

Inasmuch as the credibility of a witness must be judged of by the jury, any evidence which tends to affect it is competent.<sup>7</sup> His manner, the improbability of his story, or his self-contradiction,<sup>8</sup> may justify the jury in not believing him, or only partly believing him.<sup>9</sup> So, also, the force of circumstances otherwise proved, may contradict him.<sup>10</sup> But mere variance between the statements of two witnesses will not necessarily impeach or affect the credibility of either, as the contradiction may arise from mistake, or other cause consistent with their integrity.<sup>11</sup> Nor can it be shown to impeach the credibility of a witness that he swore to the same facts on a former trial and the jury did not believe him;<sup>12</sup> nor that he is of negro extraction;<sup>13</sup> nor that he attempted to settle the case before trial;<sup>14</sup> nor that he came from a distance without sub-

<sup>1</sup> *People v. Moore*, 15 Wend. (N. Y.) 419.

<sup>2</sup> *Goodwyn v. Goodwyn*, 20 Ga. 600; *Wiggins v. Holman*, 5 Ind. 502. See *infra*, § 203.

<sup>3</sup> *Fulmer v. Hays*, 3 McCord (S. C.) 256.

<sup>4</sup> *Varona v. Socarras*, 8 Abb. (N. Y.) Pr. 302. Compare *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154.

<sup>5</sup> *State v. Hardin*, 46 Iowa, 623; *Mershorn v. State*, 51 Ind. 14; *State v. Beal*, 68 Ind. 345; *State v. Clinton*, 67 Mo. 380; *State v. Cox*, Id. 392; *State v. Effer*, 85 N. C. 585. *Contra* in Alabama prior to the passage of the recent enabling act. *Chappell v. State*, 2 Ala. L. J. 183.

<sup>6</sup> *Phillips v. Thorn*, 84 Ind. 84; *s. c.*, 43 Am. Rep. 85; *State v. Brant*, 14

Iowa, 180; *State v. Moore*, 25 Iowa, 128; *Starks v. People*, 5 Den. (N. Y.) 106; *State v. Cherry*, 63 N. C. 493.

<sup>7</sup> *Magehan v. Thompson*, 9 Watts & S. (Pa.) 54.

<sup>8</sup> *French v. Millard*, 2 Ohio St. 44; *Burtus v. Tisdail*, 4 Barb. (N. Y.) 571; *George v. State*, 39 Miss. 570; *Terry v. State*, 13 Ind. 70.

<sup>9</sup> Compare *Hansell v. Erickson*, 28 Ill. 257; *Rankin v. Crow*, 19 Ill. 626.

<sup>10</sup> *Koehler v. Adler*, 78 N. Y. 287.

<sup>11</sup> *Sharon v. Hill*, 26 Fed. Rep. 55; *Vernon v. Tucker*, 30 Md. 456.

<sup>12</sup> *Schenck v. Griffin*, 9 Vr. (N. J.) 462.

<sup>13</sup> *Dean v. Commonwealth*, 4 Gratt. (Va.) 541.

<sup>14</sup> *People v. Austin*, 1 Park (N. Y.) Cr. 154.

pœna or fees;<sup>1</sup> nor that the witness had the opium habit, no serious or present effects appearing.<sup>2</sup>

Again, the interest of the witness may be shown for the purpose of impeaching his credit;<sup>3</sup> and the case being a criminal one, the fact that the witness is the defendant is admissible to show interest.<sup>4</sup> The state of feeling, and relationship of the witness toward a party, is also admissible;<sup>5</sup> but his admissions out of court are not to be received in proof of his interest.<sup>6</sup> And it may be shown directly that facts sworn to by the witness as existing, do not in fact exist.<sup>7</sup>

So, also, it has been held that a witness may be discredited by showing him to be deficient in mental capacity or intelligence, the result of illness or other cause.<sup>8</sup> But the courts are cautious in permitting impeachment on this ground,<sup>9</sup> and will not allow it to be done by general evidence that the witness is not possessed of ordinary intelligence or powers of mind;<sup>10</sup> and an instruction calculated to lead the jury to assume that a witness may be just as effectually impeached by showing his lack of intelligence, as by contradicting him by the positive testimony of other witnesses, is erroneous.<sup>11</sup> Weakness of memory, also, may be shown to impeach a witness.<sup>12</sup> This may be done by resorting to the opinions of persons intimately acquainted with the witness,<sup>13</sup> or by questioning the witness himself with a view to testing his memory and afterwards contradicting him by other evidence.<sup>14</sup>

For reasons analogous to these, a witness may be impeached by showing that at the time of the occurrence as to which he testifies, or at the time of the trial, the witness was or is insane,<sup>15</sup> or intoxicated.<sup>16</sup> His religious belief, also,

<sup>1</sup> *Hurst v. Burnside* (Oreg.) 8 West Coast Rep. 445.

<sup>2</sup> *McDowell v. Preston*, 26 Ga. 528. See also, for analogous instances, *Brock v. State*, 26 Ala. 104; *Sealy v. State*, 1 Ga. 213; *Blake v. Everett*, 1 Allen (Mass.) 248; *Pleasant v. State*, 13 Ark. 360; *Ellsworth v. Potter*, 41 Vt. 685.

<sup>3</sup> *Geary v. People*, 22 Mich. 220; *Hunter v. Wetsell*, 84 N. Y. 549.

<sup>4</sup> *State v. Zorn*, 71 Mo. 415.

<sup>5</sup> *Carr v. Moore*, 41 N. H. 131.

<sup>6</sup> *Mislaid v. Boynton*, 79 N. Y. 630.

<sup>7</sup> *Ripon v. Bittel*, 30 Wis. 614.

<sup>8</sup> *Fairchild v. Bascomb*, 35 Vt. 398.

<sup>9</sup> *Carpenter v. Dame*, 10 Ind. 125.

<sup>10</sup> *Bell v. Rinner*, 16 Ohio St. 45.

<sup>11</sup> *Chicago & C. R. R. Co. v. Bert*, 69 Ill. 388.

<sup>12</sup> *Alleman v. Stepp*, 52 Iowa, 626; *Rivara v. Ghio*, 3 E. D. Smith (N. Y.) 264; *Terry v. McNiel*, 58 Barb. (N. Y.) 241.

<sup>13</sup> *Isler v. Dervev*, 75 N. C. 466.

<sup>14</sup> *Terry v. McNiel*, *supra*.

<sup>15</sup> *McGuirl v. McGuirl*, 12 Ill. App. 624; *State v. Kelly*, 57 N. H. 549.

<sup>16</sup> *Fleming v. State*, 5 Humph. (Tenn.) 564; *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564. But compare *Tuttle v. Russell*, 2 Day (Conn.) 201.

may be shown, but he cannot be himself examined as to that.<sup>1</sup>

§ 197. **Right to impeach Character.** — "Character," or "general character," as used in this connection, means the standing of a person in general estimation; *i.e.*, public opinion of him,<sup>2</sup> common report of him,<sup>3</sup> *his reputation*.<sup>4</sup> To prove this to be bad is a common mode of impeachment, but the inquiry must be confined to the general reputation of the witness; particular facts, which, if true, would impeach his character for veracity, cannot be gone into; and the reason is that every man may be supposed capable of supporting his general character, but it is not likely that he should be prepared to answer to particular facts, without notice; and unless his general character and behavior are in issue, he has no notice.<sup>5</sup>

A more difficult question arises when we come to consider whether it is the general *moral* character of the witness or his general reputation for truthfulness that is the proper subject of inquiry. Upon this much discussed question the courts are hopelessly divided in opinion. Some able text-writers take the view that the moral character, as well as the reputation for truth and veracity, is open;<sup>6</sup> and they are supported by numerous authorities.<sup>7</sup> With all due respect for the eminent judges who laid down this rule, the writer is forced to accept as the safer and better doctrine, that enunciated quite recently by the Supreme Court of Minne-

<sup>1</sup> *Searcy v. Miller*, 57 Iowa, 613.

<sup>2</sup> *Boynton v. Kellogg*, 3 Mass. 192; *Douglass v. Tousey*, 2 Wend. (N. Y.) 354.

<sup>3</sup> *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 337.

<sup>4</sup> *Ibid.*, p. 338, per Duncan, J.

<sup>5</sup> *Bull. N. P.* 296, 297; *Layer's Case*, 16 How. St. Tr. 246, 286; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Long v. Morrison*, 14 Ind. 595; *Wilson v. State*, 16 Ind. 392; *Taylor v. Commonwealth*, 3 Bush (Ky.) 508; *Macdonald v. Garrison*, 2 Hilt. (N. Y.) 510; *Barton v. Morphes*, 2 Dev. (N. C.) L. 520; *Walker v. State*, 6 Blackf. (Ind.) 1; *Wike v. Lightner*, 11 S. & R. (Pa.) 198.

<sup>6</sup> *Cow. & H. notes to 2 Phil. Ev.* note 598; 2 *Tayl. Ev.* §§ 1082, 1083.

<sup>7</sup> *Majors v. State*, 29 Ark. 112; *People v. Beck*, 58 Cal. 212; *State v. Kirkpatrick*, 19 N. W. Rep. (Iowa) 660; *State v. Hart*, 25 Id. (Iowa) 99; *State v. Egan*, 59 Iowa 636; *Hume v. Scott*, 3 A. K. Marsh. (Ky.) 260; *Blue v. Kibby*, 1 T. B. Mon. (Ky.) 195; *State v. Shields*, 13 Mo. 236; *Day v. State*, Id. 422; *Gilliam v. State*, 1 Head (Tenn.) 38; *Tackett v. May*, 3 Dana (Ky.) 79; *State v. Breeden*, 58 Mo. 507; *State v. Grant*, 76 Mo. 239; *State v. Rugan*, 5 Mo. App. 592; *People v. Mather*, 4 Wend. (N. Y.) 257, 258; *State v. Stallings*, 2 Hayw. (N. C.) 300; *State v. Boswell*, 2 Dev. (N. C.) 209, 210; and many others.

sota: "The only object in inquiring into the character of a witness is to ascertain whether his statements, in themselves, are entitled to credit. If he is a truthful person, they are; otherwise, they are not. A witness therefore, in coming into court, would perhaps properly be considered as asserting his character for truthfulness to be good, and be charged with notice to defend it; but is not responsible to answer, or be required to meet an attack upon his character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness, and his reputation for truthfulness, may be unimpeachable. An inquiry in such a case as to his moral character would mislead, instead of assist, in arriving at the object of investigation, namely, his credibility; it would in any event be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues, and be more easily made the channel of venting private hatred and malice."<sup>1</sup>

And this view is even more strongly intrenched in judicial authority.<sup>2</sup> In applying it, evidence of the bad character of a female witness for chastity has been held inadmissible,<sup>3</sup> even where the proposed proof went to show her to be a common prostitute.<sup>4</sup> So it cannot be shown to impeach a witness' credibility "that he is a man of notorious bad char-

<sup>1</sup> *Rudskill v. Slingerland*, 18 Minn. 380.

<sup>2</sup> *Frye v. Bank of Illinois*, 11 Ill. 367; *United States v. Vansickle*, 2 McLean (U. S.), 219; *Patriotic Bank v. Coote*, 3 Cranch C. Ct. 169; *United States v. Masters*, 4 Id. 479; *United States v. White*, 5 Id. 38; *Nugent v. State*, 18 Ala. 521; *Carter v. Covenough*, 1 Greene (Iowa) 171; *Taylor v. Clendining*, 4 Kan. 524; *Phillips v. Kingfield*, 19 Me. 375; *Shaw v. Emery*, 42 Me. 59; *Newman v. Mackin*, 13 Sm. & M. (Miss.) 383; *Craig v. State*, 5 Ohio St. 605; *State v. Alexander*, 2 Mill (S. C.) Const. 171; *Clark v. Bailey*, 2 Strobb. (S. C.) Eq. 143; *Boon v. Weathered*, 23 Tex. 675; *Crabtree v. Kile*, 21 Ill. 180; *Ayres v. Duprey*, 27 Tex. 593; *Rixey v. Bayse*, 4

*Leigh (Va.)* 330; *Uhl v. Commonwealth*, 6 Gratt. (Va.) 706.

<sup>3</sup> *People v. Yslas*, 27 Cal. 630; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Boles v. State*, 46 Ala. 204; *Kilburn v. Mullen*, 22 Iowa, 498; *Gilchrist v. McKee*, 4 Watts (Pa.) 380; *Com. v. Moore*, 3 Pick. (Mass.) 194; *Ketchingman v. State*, 6 Wis. 426; *Weathers v. Barksdale*, 30 Ga. 888.

<sup>4</sup> *Commonwealth v. Churchill*, 11 Metc. (Mass.) 538; *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Wilds v. Blanchard*, 7 Vt. 141; *Bakeman v. Rose*, 14 Wend. (N. Y.) 105; *Spears v. Forrest*, 15 Vt. 435. But see *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363; *Commonwealth v. Murphy*, 14 Mass. 387; *Indianapolis &c. R'y Co. v. Anthony*, 43 Ind. 183.



acter—esteemed a horse-thief, and is now under charge as such,”<sup>1</sup> or that he is a notorious counterfeiter,<sup>2</sup> or a man of intemperate habits.<sup>3</sup> Many other rejected offers will be found on consulting the cases already cited.

§ 198. **Competency of Witness to Character.**—A witness called to impeach the reputation of another witness should be acquainted with the latter's general reputation for truth among his neighbors,<sup>4</sup> or, it seems with his “general character,” aside from his reputation for truth.<sup>5</sup> Such a witness is competent, even though he never heard the general reputation for veracity of the impeached witness canvassed.<sup>6</sup> Whether his opinion be founded upon his own personal knowledge of the party, or upon common rumor, makes no difference as respects his competency, however it may affect the weight of his testimony.<sup>7</sup>

As to the length of time during which the impeaching witness must have known the reputation of the impeached witness, no rule can be laid down. Eight or ten years' acquaintance was held sufficient in one case;<sup>8</sup> in others, witnesses were held competent whose acquaintanceship with the party sought to be impeached had terminated, by removal, several years before the trial;<sup>9</sup> and in others, where such acquaintance had originated after the commencement of the action in which the impeaching testimony was offered.<sup>10</sup>

<sup>1</sup> *State v. Sater*, 8 Iowa, 420. S. P., *State v. Bruce*, 24 Me. 71.

<sup>2</sup> *Crane v. Thayer*, 18 Vt. 162. See also *Berner v. Mittnacht*, 2 Sweeny (N. Y.) 582.

<sup>3</sup> *Hoitt v. Moulton*, 21 N. H. 586; *Thayer v. Boyle*, 30 Me. 475.

<sup>4</sup> *Kelly v. Proctor*, 41 N. H. 139; *Dave v. State*, 22 Ala. 23.

<sup>5</sup> *Johnson v. People*, 3 Hill (N. Y.) 178.

<sup>6</sup> *Hadjo v. Gooden*, 13 Ala. 718; *Dave v. State*, 22 Ala. 23; *Ward v. State*, 28 Ala. 53; *Childs v. State*, 55 Ala. 28; *Lenox v. Fuller*, 39 Mich. 268.

<sup>7</sup> *State v. Meadows*, 18 W. Va. 658; *State v. Hart*, (Iowa) 25 N. W. Rep. 99; *Dufresne v. Wiese*, 46 Wis. 290; *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 336. But compare *Crabtree v. Kile*, 21 Ill. 180, where it is said that the

impeaching witness must be able to state what is generally said of the person to be impeached, among his associates; and *Hadley v. State*, 55 Ala. 31, where a witness who said that he knew the person sought to be impeached, but did not know his character, was rejected. See also *Keeteringham v. Dance*, 58 Iowa, 632.

<sup>8</sup> *Dupree v. State*, 33 Ala. 380.

<sup>9</sup> *Kelly v. State*, 61 Ala. 19; *Graham v. Chrystal*, 2 Abb. (N. Y.) App. Dec. 263; *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431; *Martin v. Martin*, 25 Ala. 201. *Contra*, *Webber v. Hanke*, 4 Mich. 198; *Chance v. Indianapolis &c. R. Co.*, 32 Ind. 472.

<sup>10</sup> *Fischer v. Conway*, 21 Kan. 18; *Mask v. State*, 36 Miss. 77. See also *Cook v. Miller*, 6 Watts (Pa.) 507, where the prejudices of the impeaching witness were held not to disqualify

On the other hand, a witness who based his belief upon his individual opinion and feelings, and not upon any knowledge of the reputation of the impeached witness in the community in which he lived, as to which he was wholly unformed, was rejected;<sup>1</sup> as was one who stated he had no knowledge as to the general character of the witness, save only as connected with some "alleged frauds."<sup>2</sup> So, also, a stranger sent into the witness' neighborhood to learn his character, will not be permitted to testify as to the result of his inquiries.<sup>3</sup>

§ 199. **What Questions may be put to Witness to Character.**—

The first inquiry to be put to the witnesses called to impeach another, must ordinarily be as to their acquaintance with him, and his general character for truth and veracity in the neighborhood where he resides; next, what that reputation is; then the question may be asked, whether, from their knowledge of his general reputation for truth, they would believe him under oath.<sup>4</sup>

Taylor, in his treatise on evidence, insists that the inquiry in such cases involves the entire moral character of the witness whose credit is thus impeached, and his estimation in society,<sup>5</sup> but the weight of American authority limits the inquiry to the reputation of the witness for truth and veracity, as we have already seen;<sup>6</sup> some cases, however, allowing testimony as to general moral character to be given, provided the first questions put to the impeaching witness call for his knowledge of the reputation for truth of the witness under impeachment.<sup>7</sup> It is the *general public reputation* of

him. That the party is not confined to proof of the reputation at the time of trial, see *Memphis & Ohio River &c. Co. v. McCool*, 83 Ind. 392; *Dollner v. Lintz*, 84 N. Y. 669. And compare *Rawles v. State*, 56 Ind. 433; *Lawson v. State*, 32 Ark. 220; *Robinson v. State*, 16 Fla. 835; *Brown v. Luehrs*, 1 Ill. App. 74; *State v. Lanier*, 79 N. C. 622.

<sup>1</sup> *Ayres v. Duprey*, 27 Tex. 593. S. P., *Com. v. Rogers*, (Mass.) 17 Rep. 558.

<sup>2</sup> *Sorrelle v. Craig*, 9 Ala. 534.

<sup>3</sup> *Reid v. Reid*, 2 C. E. Gr. (N. J.)

101; *Curtis v. Fay*, 37 Barb. (N. Y.) 64.

<sup>4</sup> *Bogle v. Kreitzer*, 46 Pa. St. 465. S. P., *Stokes v. State*, 18 Ga. 17; *Henderson v. Hayne*, 2 Metc. (Ky.) 342; *People v. Mather*, 4 Wend. (N. Y.) 229; *Mobley v. Hamit*, 1 A. K. Marsh. (Ky.) 590; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Elam v. State*, 25 Ala. 53.

<sup>5</sup> 2 Tayl. Ev. §§ 1082, 1083.

<sup>6</sup> *Supra*, p. 330, note 2.

<sup>7</sup> *Teese v. Huntingdon*, 23 How. (U. S.) 2; *Boyd v. Lewis*, 13 Johns. (N. Y.) 504. See also *Noel v. Dickey*, 3 Bibb (Ky.) 268.

the witness as a truthful or untruthful person in the community where he is best known, that is the subject of inquiry; specific acts of immorality, untruthfulness, or other misconduct cannot be inquired about or proved.<sup>1</sup> The impeaching witness must not say he was told that the person had a good or bad character. "I have heard others say," will not do. Others' sayings may not be his general character. Others may be only two or three. There are few men of whom some do not speak well and some ill. The question is, *what is said by people in general?* Everything short of that is incorrect.<sup>2</sup>

Nor can specific acts be shown to disparage the character of a witness; such as a letter written by him, the language of which might evince a depraved or unchaste character,<sup>3</sup> or an attempt by him to evade arrest on a criminal charge,<sup>4</sup> or the manner in which he kept his accounts,<sup>5</sup> and the like.

As to the form of the questions to be put to the impeaching witness, it has been held to be immaterial in what form of words the questions are put if the necessary facts are made to appear.<sup>6</sup>

<sup>1</sup> Johnson v. State, 61 Ga. 305; Dimick v. Downs, 82 Ill. 570; Meynecke v. State, 68 Ind. 401; Moreland v. Lawrence, 23 Minn. 84; Wehrkamp v. Willet, 4 Abb. (N. Y.) App. Dec. 548; Conley v. Mecker, 85 N. Y. 618; Bucklin v. State, 20 Ohio, 18; Johnson v. Brown, 51 Tex. 65; Marshall v. State, 5 Tex. App. 273.

<sup>2</sup> Per Tilghman, C. J., in Wike v. Lightner, 11 S. & R. (Pa.) 199, 200. S. P., Matthewson v. Burr, 6 Neb. 312; Gulerette v. McKinley, 27 Hun (N. Y.) 320.

<sup>3</sup> Leverich v. Frank, 6 Oreg. 212.

<sup>4</sup> Moore v. State, 68 Ala. 360.

<sup>5</sup> Long v. Taylor, 29 Hun (N. Y.) 127. See Commonwealth v. Murphy (14 Mass. 387), where notorious unchastity was allowed to be shown. That case, however, is virtually overruled by Commonwealth v. Moore (3 Pick. (Mass.) 194), where such evidence was rejected. As to the admissibility of such evidence in Kentucky, see Evans v. Smith, 5 Mon. 363, 365; Blue v. Kibby, 1 Id. 195; Hume v.

Scott, 3 Marsh. 260; Noel v. Dickey, 3 Bibb, 268; Mobby v. Hamit, 1 Marsh. 591.

<sup>6</sup> Kelley v. Proctor, 41. N. H. 139.

The following questions have been held permissible: "Do you know the general character of A for truth and veracity in the county of Russell?" (Boswell v. Blackman, 12 Ga. 591.) "Are you acquainted with the general reputation of the witness sought to be impeached, among his friends, neighbors, and associates?" (Crabtree v. Hagenbaugh, 25 Ill. 233.) "What is his general character for truth in that town?" (Woodman v. Churchill, 51 Me. 112.) "Are you acquainted with A's reputation for truth and veracity? If so, what is it?" (French v. Millard, 2 Ohio St. 44; S. P., Knode v. Williamson, 17 Wall. (U. S.) 586.) "Are you acquainted with the general character of the witness?" (Hancock v. Stephens, 11 Humph. (Tenn.) 570.) "Do you know the general character of the witness for truth and veracity in the neighborhood in which he re-

Another point upon which the adjudged cases fail to harmonize is, as to whether the impeaching witness may be allowed to state whether or not, from his knowledge of the reputation for truth of the witness sought to be impeached, he would believe him under oath. The affirmative of this proposition has been held in many cases, some of which are cited below,<sup>1</sup> and such is clearly the English rule.<sup>2</sup> In some of the American jurisdictions, the propriety of this rule appears to have been doubted,<sup>3</sup> but the weight of authority seems clearly to be in favor of the English rule.<sup>4</sup>

sides or recently resided?" (*Langhorne v. Commonwealth*, 76 Va. 1012.)

The following questions were held inadmissible in the form in which they were put: "Are you acquainted with the rumor and belief of people about the witness?" (*Pleasant v. State*, 15 Ark. 624.) "Whether, from the treatment and conduct of the community generally, towards the witness, you know enough about his general character to say what it is for truth and veracity?" (*Bates v. Barber*, 4 Cush. (Mass.) 107.) "Have you heard his character for truth and veracity called in question?" "If you have heard his character for truth and veracity called in question, state what the common speech of people is as to his character for truth and veracity." "What is the general reputation of C for truth and veracity, among those who speak of it at all?" (*Commonwealth v. Lawler*, 12 Allen (Mass.) 585.) "Did B state to you that he regarded it as no wrong to swear falsely against such a man as C?" (*Wilder v. Peabody*, 21 Hun (N. Y.) 376.) "In what estimation is the witness held in this neighborhood?" (*State v. O'Neal*, 4 Ired. (N. C.) L. 88.)

<sup>1</sup> *Stevens v. Irwin*, 12 Cal. 306; *Eason v. Chapman*, 21 Ill. 33; *Knight v. House*, 29 Md. 194; *Keator v. People*, 32 Mich. 484; *People v. Rector*, 19 Wend. (N. Y.) 569.

<sup>2</sup> *Mawson v. Hartsink*, 4 Esp. 104; 1 Stark. Ev. 182; *Carlos v. Brook*, 10 Ves. 50. See also, to same effect, *People v. Mather*, 4 Wend. (N. Y.)

258; *State v. Boswell*, 2 Dev. (N. C.) L. 211; *Anon.*, 1 Hill (S. C.) 258; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Wilson v. State*, 3 Wis. 798.

<sup>3</sup> 1 Greenl. Ev. § 461, and cases cited.

In *Phillips v. Kingfield*, 1 App. (Me.) 375, 379, *Shepley, J.*, laid down a dictum in disapproval of the English rule, upon which Mr. Greenleaf seems to have relied rather too strongly, as appears from the subsequent case of *Hamilton v. People* (29 Mich. 173), where it is said that "The English rule was never seriously questioned until Mr. Greenleaf's statement . . . that the American authorities disfavored it. Of the cases he refers to, not one contains a decision on the question, and only one contains more than a passing dictum, not in any way called for (*Phillips v. Kingfield*, 1 App. (Me.) 375). The authorities referred to in that case contained no such decision, and the court declared the question not presented by the record for decision. . . . So far as the reports show, the American decisions are decidedly in favor of the English doctrine, and we have not found any considerable conflict" (citing many cases). This ruling was affirmed in *Keator v. People*, 32 Mich. 484. The opposite view seems to be entertained in *Massey v. Farmers' Bank*, 104 Ill. 327; *King v. Peakman*, 5 C. E. Gr. (N. J.) 316; *Hooper v. Moore*, 3 Jones (N. C.) L. 428; and *Willard v. Goodenough*, 30 Vt. 393.

<sup>4</sup> In Texas it is held that after an impeaching witness has stated that he knows the general reputation for

§ 200. **Sufficiency and Effect of Proof as to Character.**—Proof that a witness had said that he would “swear to anything,”<sup>1</sup> or that “on some occasions he would swear to a lie,”<sup>2</sup> has been held sufficient to destroy his credit.<sup>3</sup> The jury are not bound, however, by the opinions of the impeaching witnesses;<sup>4</sup> and it has been held erroneous to instruct them that “if the general character of a witness for truth is successfully impeached, you are bound to disregard the whole of his testimony.”<sup>5</sup> In such a case the testimony of the impeached witness should be given such weight as it may be entitled to under the circumstances,<sup>6</sup> and when compared with the other evidence and facts proved in the case.<sup>7</sup> He may be relied upon so far as his testimony is intrinsically probable, or corroborated by circumstances.<sup>8</sup>

The manner of the impeaching witness should be closely scrutinized — if he answers incoherently, obscurely, and contradictorily, not apprehending, evidently, the point of the inquiry, this fact should be considered by the jury.<sup>9</sup>

§ 201. **Showing Previous Conviction or Prosecution for Crime.**—Formerly, when convicts were not admitted as witnesses, proof of conviction of crime was altogether fatal, not only to the credibility, but also to the giving of any testimony whatever by the witnesses.<sup>10</sup> Since the almost universal abolition of incompetency by reason of infamy, however, the fact that a witness has been convicted of a crime which would have excluded him at common law is allowed to be shown for the purpose of affecting his credit with the jury.<sup>11</sup> But the fact must be shown by the record,

truth of the assailed witness, and that it is bad, he may be asked whether from that reputation the assailed witness is worthy of belief. This is held not tantamount to the objectionable inquiry whether the impeaching witness would himself believe the assailed witness. *Bluitt v. State*, 12 Tex. App. 39; *Holbert v. State*, 9 Id. 219; s. c., 35 Am. Rep. 738.

<sup>1</sup> *Newhall v. Wadhams*, 1 Root (Conn.) 504.

<sup>2</sup> Anonymous, 1 Hill (S. C.) 251. But see *City Bank v. Kent*, 57 Ga. 283.

<sup>3</sup> In Louisiana a decision in a civil action, declaring a witness not entitled to credit, was held not to disqualify

him, though greatly to affect his credit. *Farr v. Gyles*, 3 La. Ann. 669.

<sup>4</sup> *Spivey v. State*, 8 Ind. 405.

<sup>5</sup> *Sharp v. State*, 16 Ohio St. 218.

<sup>6</sup> *Belcher v. Conner*, 1 So. Car. 88.

<sup>7</sup> *Jernigan v. Wainer*, 12 Tex. 189.

<sup>8</sup> *Adams v. Adams*, 2 C. E. Gr. (N. J.) 324.

<sup>9</sup> *Sims v. State*, 68 Ga. 486; *Bullard v. Lambert*, 40 Ala. 204.

<sup>10</sup> See *supra*, §§ 14–20.

<sup>11</sup> *Commonwealth v. Gorham*, 99 Mass. 420; *Jeffersonville & C. R. R. Co. v. Riley*, 39 Ind. 568; *Glenn v. Clore*, 42 Ind. 60; *Commonwealth v. Hall*, 4 Allen (Mass.) 305; *State v. Kelsoe*, 76 Mo. 505.

or a certified copy thereof; parol evidence of the conviction of the witness of an infamous crime will not be received.<sup>1</sup> And his *conviction* by a court of competent jurisdiction must be shown; a mere arrest, or indictment, or prosecution — even a verdict against him — will not do: the *judgment of conviction* must be proved by the record.<sup>2</sup>

Whether the record of a conviction in another State will be admitted to discredit a witness is a point as to which the cases are not in harmony.<sup>3</sup>

It is the *conviction*, not the punishment, which discredits; therefore the prison record is inadmissible to impeach the witness;<sup>4</sup> and the conviction must have been for an infamous offence, not for one not infamous, for such a conviction is not legally presumed to affect the witness' credibility.<sup>5</sup> Thus in a prosecution for assault with special intent, a record showing an acquittal of the intent and a conviction for simple assault is not admissible to discredit the witness.<sup>6</sup> But the record, when properly admitted, is conclusive, and the witness will not be permitted to declare his innocence of the crime therein charged;<sup>7</sup> nor will a pardon render the record inadmissible.<sup>8</sup>

A confession of guilt, or plea of guilty, without proof of the entry of a judgment of conviction, is not admissible to discredit the witness.<sup>9</sup>

<sup>1</sup> *United States v. Woods*, 4 Cranch, C. C. 484; *Hall v. Brown*, 30 Conn. 551; *Farley v. State*, 57 Ind. 331; *Newcomb v. Griswold*, 24 N. Y. 298; *Rathburn v. Ross*, 46 Barb. (N. Y.) 127; *Peck v. York*, 47 Barb. (N. Y.) 131; *Matter of Real*, 55 Id. 186; s. c., 7 Abb. Pr. N. S. 26.

<sup>2</sup> *Anderson v. State*, 34 Ark. 257; *People v. Elster*, 5 Crim. L. Mag. 687; *Johnson v. State*, 48 Ga. 116; *Canada v. Curry*, 73 Ind. 246; *State v. Damery*, 48 Me. 327; *Fay v. Harlan*, 128 Mass. 244; *McLaughlin v. Cowley*, 131 Mass. 70; *West v. Lynch*, 7 Daly (N. Y.) 245; *Campbell v. State*, 23 Ala. 44; *Lipe v. Eisenlerd*, 32 N. Y. 229.

<sup>3</sup> That it will be, see *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496. That it will not be, see *Camp-*

*bell v. State*, 23 Ala. 44. That the witness can avow his innocence of the crime charged in such foreign record, see *Sims v. Sims*, 75 N. Y. 466.

<sup>4</sup> *Bartholomew v. People*, 104 Ill. 601; s. c., 44 Am. Rep. 97.

<sup>5</sup> *Bartholomew v. People*, *supra*; *State v. Huff*, 11 Nev. 17; *Coble v. State*, 31 Ohio St. 100.

<sup>6</sup> *Glenn v. Clore*, 42 Ind. 60.

<sup>7</sup> *State v. Watson*, 65 Me. 74; *Commonwealth v. Gallagher*, 126 Mass. 54; *Sims v. Sims*, 12 Hun (N. Y.) 231; *Gardner v. Bartholomew*, 40 Barb. (N. Y.) 325.

<sup>8</sup> *Curtis v. Cochran*, 50 N. H. 242; *Baum v. Clause*, 5 Hill (N. Y.) 196.

<sup>9</sup> *Fay v. Harlan*, 128 Mass. 244; *McLaughlin v. Cowley*, 131 Id. 70; *Dickinson v. Dustin*, 21 Mich. 561.

Another point upon which the authorities disagree is, whether it be proper to question the witness, on cross-examination, as to his previous arrest, prosecution, or conviction for crime, with a view to impair his credit with the jury. In California this may be done, or the party may prove the conviction by the record.<sup>1</sup> So, in New York a witness may be asked on cross-examination whether he has been in jail, the penitentiary, or State prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places. The extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse.<sup>2</sup> In North Carolina, it is held that a witness may be asked if he has not committed perjury in another State.<sup>3</sup> On the other hand, it has been held in Massachusetts,<sup>4</sup> Michigan,<sup>5</sup> New York,<sup>6</sup> and Virginia,<sup>7</sup> that this line of questioning on cross-examination for the purpose of impeachment, is improper and not to be allowed.

Where the witness under examination in a criminal trial is the accused himself, it is pretty well settled that he may be interrogated as to previous arrests and convictions, and even mere charges of crime, with a view to injure his credit.<sup>8</sup>

§ 202. **Showing Bias or Prejudice.**—A witness may be impeached by proof that his impartiality is affected by motives arising from friendship, affection, fear, or interest.<sup>9</sup> Such evidence is not regarded as collateral to the issue.<sup>10</sup>

The hostility of the witness may be shown either by the testimony of the witness himself or by extrinsic evidence;<sup>11</sup>

<sup>1</sup> Code Civ. Pro. § 2051; *People v. Chin Mook Sow*, 51 Cal. 597; *People v. Johnson*, 57 Cal. 571.

<sup>2</sup> *Real v. People*, 42 N. Y. 270.

<sup>3</sup> *State v. March*, 1 Jones (N. C.) L. 526.

<sup>4</sup> *Smith v. Castles*, 1 Gray (Mass.) 108.

<sup>5</sup> *Marx v. Hilsendegen*, 46 Mich. 336.

<sup>6</sup> *Brown v. People*, 8 Hun (N. Y.) 562; *Crapo v. People*, 15 Id. 269; *Tift v. Moor*, 59 Barb. (N. Y.) 619. But see *Ryan v. People*, 79 N. Y. 593.

<sup>7</sup> *Langhorne v. Commonwealth*, 76 Va. 1012.

<sup>8</sup> *People v. Cummins*, 47 Mich. 334;

*State v. Lawborn*, 88 N. C. 634; *Commonwealth v. Murray*, 13 Phil. (Pa.) 454. And so may the defendant in a civil action for indecent assault. *Le-land v. Kauth*, 47 Mich. 508.

<sup>9</sup> *Johnson v. Wiley*, 74 Ind. 233; *United States v. Schindler*, 10 Fed. Rep. 547; *Garbrough v. State*, 71 Ala. 376.

<sup>10</sup> *Nation v. People*, 6 Park. (N. Y.) Cr. 258; *Howell v. Ashmore*, 2 Zab. (N. J.) 261. Compare *Martin v. Far-num*, 24 N. H. 191; *Langehorne v. Com.*, 76 Va. 1012.

<sup>11</sup> *Schultz v. Third Ave. R. R. Co.*, 89 N. Y. 242; *reversing s. c.*, 46 Superior, 211; *Titus v. Ash*, 24 N. H.

but the evidence must be direct and pointed, not indirect and uncertain;<sup>1</sup> and the unfriendly feeling must be shown to exist at the time of the trial.<sup>2</sup>

A quarrel between the witness and the party against whom he testifies, may be shown, although not relating to the subject-matter of the suit; and, if the witness denies that there has been such a quarrel, he may be contradicted.<sup>3</sup> Anything disclosing bias, which may affect the credit of the witness in the slightest degree may be proved,<sup>4</sup> such as statements by the witness that he "would get even" with the party,<sup>5</sup> or an attempt by him to get from the party his copy of the contract sued on.<sup>6</sup> But the use, by the witness, of expressions indicating ill feeling cannot be proved without showing what the expressions were.<sup>7</sup> So, also, where the witness denies having made threats against the party, evidence that he attempted to bribe the party not to testify, is incompetent to contradict him.<sup>8</sup> If the witness admits on cross-examination that he entertains unkind feelings towards the party, it seems that he cannot be asked the cause of those feelings.<sup>9</sup> Prejudice may be shown, but the facts and circumstances causing such prejudice cannot be stated in detail.<sup>10</sup>

§ 203. **Proof of Contradictory or Inconsistent Statements, generally.**—Perhaps the most frequent method of impeach-

319; *Pierce v. Gilson*, 9 Vt. 216; *Martin v. Barnes*, 7 Wis. 239; *Doggett v. Tallman*, 8 Conn. 168; *Drew v. Wood*, 26 N. H. 363; *Bishop v. State*, 9 Ga. 121; *Bersch v. State*, 13 Ind. 434; *State v. Montgomery*, 28 Mo. 594; *Folsom v. Brawn*, 25 N. H. 114; *Martin v. Farnham*, Id. 195; *Hutchinson v. Wheeler*, 35 Vt. 330. *Contra*, *Edwards v. Sullivan*, 8 Ired. (N. C.) L. 302.

<sup>1</sup> *Gale v. N. Y. Central &c. R. R. Co.*, 76 N. Y. 594.

<sup>2</sup> *Higham v. Gault*, 15 Hun (N. Y.) 383.

<sup>3</sup> *Beardsley v. Wildman*, 41 Conn. 515; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *Brewer v. Crosby*, 11 Gray (Mass.) 29; *Lucas v. Flynn*, 35 Iowa, 9; *McHugh v. State*, 31 Ala. 317; *Day v. Stickney*, 14 Allen (Mass.) 255; *Newcomb v. State*, 37 Miss. 383; *Daffin v. State*, 11 Tex. App. 76.

<sup>4</sup> *Batdorff v. Farmer's Nat. Bank*, 61 Pa. St. 179.

<sup>5</sup> *Starr v. Cragin*, 24 Hun (N. Y.) 177. *S. P.*, *Sager v. State*, 11 Tex. App. 110.

<sup>6</sup> *Swett v. Shumway*, 102 Mass. 365.

<sup>7</sup> *Hatchett v. Gibson*, 13 Ala. 587; *Cornelius v. State*, 12 Ark. 782. *S. P.*, *State v. Bilansky*, 3 Minn. 246.

<sup>8</sup> *Cooley v. Norton*, 4 Cush. (Mass.) 93.

<sup>9</sup> *Conyers v. Field*, 61 Ga. 258. See also *Pond v. Pond*, 132 Mass. 219.

For decisions applying the above principles in cases of accomplice witnesses, see *Allen v. State*, 10 Ohio St. 287; *People v. Langtree*, 12 Pac. C. L. J. 247.

In cases of spies and detectives, see *State v. Tosney*, 26 Minn. 262.

<sup>10</sup> *Butler v. State*, 34 Ark. 480; *Polk v. State*, 62 Ala. 237; *State v. Glynn*, 51 Vt. 577; *Chelton v. State*, 45 Md. 564.



ing the credit of a witness is to show that he has made statements out of court, on the same subject, inconsistent with or contrary to what he swears at the trial. In order to show this he must be previously cross-examined as to such alleged statements so as to apprise him of the time, place, and person involved in the supposed contradiction,<sup>1</sup> and such statements must also be material to the question at issue.<sup>2</sup> The object is to excite doubt and distrust as to the witness' testimony regarding the particular transaction out of which the discrepancy arises, and, in some cases, to raise suspicion as to the truth of his testimony in general.<sup>3</sup> The propriety of such mode of impeachment is sustained by a multitude of cases, a few of which are cited.<sup>4</sup> This rule applies to parties testifying in their own behalf, and to defendants in criminal cases who take the witness-stand,<sup>5</sup> in the same degree as to other witnesses.

The two statements, however, must conflict in some way. The one made out of court must be inconsistent with some fact stated by the witness in his testimony, or with its general drift;<sup>6</sup> but if the two accounts are substantially inconsistent, that is all that is required.<sup>7</sup> Sometimes a statement made out of court, after the witness has given his testimony, may be proved to impeach him; as, where after leaving the stand he declares that what he has just sworn is a sheer fabrication.<sup>8</sup> So, also, it may be shown that the witness has testified to material facts which he omitted to state on a former trial of the cause;<sup>9</sup> or that he claimed to defend the

<sup>1</sup> *Infra*, §§ 205-210. Compare *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71.

<sup>2</sup> *Infra*, § 209. See also *De Saily v. Morgan*, 2 Esp. 691; *Christian v. Coombe*, Id. 489.

<sup>3</sup> 2 Phil. Ev. \*959.

<sup>4</sup> *Hand v. The Elvira*, Gilp. (U. S.) 60; *Wright v. Deklyne*, Pet. C. Ct. 199; *McDaniel v. Baca*, 2 Cal. 326; *Floyd v. Wallace*, 31 Ga. 688; *Galena &c. R. R. Co. v. Fay*, 16 Ill. 558; *Shields v. Cunningham*, 1 Blackf. (Ind.) 86; *Lawrence v. Lanning*, 4 Ind. 194; *N. O. Draining Co. v. De Lizardi*, 2 La. Ann. 281; *Foot v. Hunkins*, 98 Mass. 523; *Gerrish v. Pike*, 36 N. H. 510; *Murphy v. McNiell*,

2 Dev. & B. (N. C.) L. 244; *Lamb v. Stewart*, 2 Ohio, 230; *Stahle v. Spohn*, 8 S. & R. (Pa.) 317; *Allen v. Harrison*, 30 Vt. 219; *Charlton v. Unis*, 4 Gratt. (Va.) 58.

<sup>5</sup> *State v. Abrams*, 8 W. C. Rep. (Oreg.) 509.

<sup>6</sup> *Hall v. Young*, 37 N. H. 134.

<sup>7</sup> *Martin v. Farnham*, 25 N. H. 195. Proof of a different but not inconsistent statement is inadmissible to impeach the witness. *Hall v. Simmons*, 24 Tex. 227.

<sup>8</sup> *People v. Moore*, 15 Wend. (N. Y.) 419. Compare *Craft v. Commonwealth* (Ky.) 16 Rep. 621.

<sup>9</sup> *Briggs v. Taylor*, 35 Vt. 57.

suit on the former trial, on grounds wholly inconsistent with his present attitude and testimony.<sup>1</sup> The fact that the statement out of court was made when the witness was under arrest is no ground for the exclusion of proof of it, for the purpose of contradicting the witness, if his testimony at the trial is inconsistent with such statement.<sup>2</sup>

§ 204. **Can Former Statement be proved where Witness neither admits nor denies?** — Whether, if the witness, when questioned as to a contradictory verbal statement, neither admits nor denies the making it, proof of such statement can be made, is a point upon which there is a diversity of opinion. In *Crowley v. Page*, Parke, B., observed: "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but only such statements as are relevant are admissible, and, in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them (and, as I conceive, for that purpose only), the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence he is supposed to have said it, or some other circumstance sufficient

<sup>1</sup> *Nye v. Merriam*, 35 Vt. 438.

<sup>2</sup> *Reyes v. State*, 10 Tex. App. 1.

Proving previous statements showing hostility or ill feeling, the existence of which is denied by the witness, see *Scott v. State*, 64 Ind. 400; *McFarlin v. State*, 41 Tex. 23.

Showing discrepancies between testimony given at former and present trials, see *Glenn v. Carson*, 3 Greene (Iowa) 529; *State v. Mulholland*, 16 Ia. Ann. 376; *Commonwealth v. Mead*, 12 Gray (Mass.) 167; *People v. Morriggan*, 29 Mich. 5; *State v. Lawlor*, 28 Minn. 216; *Chesley v. Chesley*, 37 N. H. 229; *Cowden v. Reynolds*, 12 S. & R. (Pa.) 281; *Miller v. Stern*, 12 Pa. St. 383; *Wormeley v. Commonwealth*, 10 Gratt. (Va.) 658.

By what witnesses the contradiction may be proved, see *State v. Marler*, 2 Ala. 43; *State v. McDonald*, 65

Me. 466; *Howe v. Thayer*, 17 Pick. (Mass.) 91.

What writings may be introduced to show it, see *Smith v. State*, 28 Ga. 19; *Boyd v. First & C. Bank*, 25 Iowa, 255; *Baylor v. Smithers*, 1 T. B. Mon. (Ky.) 6; *Robinson v. Heard*, 15 Me. 296; *Webster v. Calden*, 55 Me. 165; *Pittsburg & C. R. R. Co. v. Andrews*, 39 Md. 329; *Neilson v. Columbia Ins. Co.*, 1 Johns. (N. Y.) 301; *Huff v. Bennett*, 6 N. Y. 337; *State v. Whit*, 5 Jones (N. C.) 224; *Thayer v. Gallop*, 13 Wis. 539.

For instances of unsuccessful attempts to impeach witnesses by proof of contrary statements, see *State v. Shannehan*, 22 Iowa, 435; *Shaw v. Emery*, 42 Me. 59; *Commonwealth v. Parker*, 2 Cush. (Mass.) 212; *State v. Hickman*, 75 Mo. 416; *Bearss v. Copsley*, 10 N. Y. 93; *Weatherhead v. Sewell*, 9 Humph. (Tenn.) 272.

to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, — always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember.”<sup>1</sup> This doctrine has been followed in this country by some courts,<sup>2</sup> and denied and questioned by others;<sup>3</sup> and in a case decided some years prior to *Crowley v. Page*, Tindal, C. J., said he had never heard such evidence admitted in contradiction, except where the witness had expressly denied the statement; and he rejected the evidence.<sup>4</sup> Lord Abinger, also, expressed a similar opinion in a subsequent case.<sup>5</sup>

However, the ruling of Parke, B., appears to be the most sound, and fittest to be followed. It is true, the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a *contradictory statement*, for, until further inquiry be made, there is no apparent contradiction; but still, it seems, the evidence should be admitted, for the imputed statement, when proved, may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury that the witness did not speak truth in saying he did not remember making the statement. If the rule were otherwise, it might happen that, under the pretence of *not remembering*, a witness who has made a false statement, and who knows it to be false, would escape contradiction and exposure. If the ruling of Parke, B., is adopted, and the statement imputed to the witness should appear on inquiry to contradict his

<sup>1</sup> 7 Car. & P. 791.

<sup>2</sup> *Payne v. State*, 60 Ala. 80; *Sealy v. State*, 1 Ga. 213; *Ray v. Bell*, 24 Ill. 444; *Lewis v. State*, 4 Kan. 296; *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Gibbs v. Linabury*, 22 Mich. 479; *Nute v. Nute*, 41 N. H. 60; *People v. Jackson*, 3 Park. (N. Y.) Cr. 590; *Gregg v. Jamison*, 55 Pa. St. 468; *Janeway v. State*, 1 Head (Tenn.) 130.

<sup>3</sup> *Wiggins v. Holman*, 5 Ind. 502;

*McVey v. Blair*, 7 Ind. 590; *State v. Reed*, 60 Me. 550; *Robinson v. Pitzer*, 3 W. Va. 335.

<sup>4</sup> *Pain v. Beeston*, 1 Moo. & R. 20.

<sup>5</sup> *Long v. Hitchcock*, 9 Car. & P. 619. In this case the witness was asked if he would swear that he had not made a certain oral statement, and he refused to so swear; he did not plead want of recollection.

evidence in court, it would evidently be proper to give him an opportunity, on re-examination, to make any explanation in his power as to the apparent contradiction.<sup>1</sup>

§ 205. **Proof of Contradictory Written Statements.** — A witness may be impeached, also, by establishing a contradiction or inconsistency between his testimony at the trial, and the contents of a letter written by him, a deposition sworn to by him, or any statement in writing the authorship of which is proven to be his. But in order to make the writing admissible for this purpose, it is not enough to state its contents and to ask him, generally, if he wrote or swore to such a paper, or one to such effect: the paper itself must be produced, under the well settled rule requiring the best evidence, and it must be shown to the witness, who must be asked if he wrote it or swore to it, as the case may be. This was decided in the House of Lords in the Queen's Case.<sup>2</sup> If the original paper cannot be had, a certified copy thereof may be used.<sup>3</sup>

<sup>1</sup> 2 Phil. Ev. \*960.

<sup>2</sup> 2 Brod. & B. 286. In this case the following question was put to the judges for their opinion: "Whether a party on cross-examination would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked the witness whether the witness wrote that letter, and his admitting that he wrote such letter?" The judges answered in the negative; and the reasons of their opinion, as delivered by Abbott, C. J., were that "the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness; if the witness admits that it is of his handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence; and when the letter is pro-

duced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments, is in order that the court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, might have an effect very different from that which might be produced by the statement of a part.' But see 17 & 18 Vict. 125, §§ 24, 103, and 28 & 29 Vict. c. 13, §§ 1, 5, where the rule laid down in the Queen's Case is reversed; and see also Sladden v. Sergeant, 1 Fost. & F. 322; Farrow v. Blomfield, Id. 653, where it is held that a *party testifying in his own case*, may be cross-examined as to the contents of an affidavit or letter not produced. To the same effect, see Ireland v. Stiff, 1 Fost. & F. 340; Minns v. Smith, Id. 318. See also McDonnell v. Evans, 16 Jur. 103.

<sup>3</sup> Reg. v. Shellard, 9 Car. & P. 277.

As to contradicting a witness by

§ 206. **Whole Paper need not be shown Witness.**—When the letter or other paper is produced by the cross-examining counsel, he may, if he thinks proper, show the witness only a part, or only one or more lines of the letter, and not the whole of it; and may ask the witness whether he wrote such part, or such one or more lines.

If the witness does not admit that he wrote the part shown to him, he cannot be cross-examined as to the contents of the letter, for the reason that the paper itself ought to be produced, in order that the whole may be seen and the one part explained by the other. If, on the other hand, the witness should admit that he wrote the letter, still the rule with respect to cross-examining as to the contents is precisely the same; the counsel cannot inquire of the witness whether or not certain statements are in the letter; the letter itself must be read to show whether it contains such statements.<sup>1</sup> With respect to the proper time for reading the letter, the ordinary rule is, that it shall be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; but if he suggests to the court that he wishes to have the letter read immediately, in order to found certain questions upon the contents, which cannot well or effectually be done without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel: still, however, it must be considered as part of the evidence of the cross-examining counsel, and subject to all the consequences of his having it so considered.<sup>2</sup>

§ 207. **Showing Contents of Lost Writing.**—The rule we have just been considering applies only to cases where the writing by means of which it is sought to impeach the wit-

producing his deposition previously sworn to, see *McNeill v. Arnold*, 22 Ark. 477; *State v. Hayden*, 45 Iowa, 11; *Johnson v. Chicago &c. R. R. Co.*, 59 Id. 348; *Grosse v. State*, 11 Tex. App. 364.

Producing witness' letters to contradict him, see *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191; *McLeod v. Bullard*, 84 N. C. 515.

For further decisions illustrating the rules laid down in the text, see

*Drew v. Wadleigh*, 7 Me. 94; *Brooks v. Goss*, 61 Me. 307; *Hastings v. Livermore*, 15 Gray (Mass.) 10; *West v. State*, 2 Zab. (N. J.) 212; *State v. Bryan*, 89 N. C. 531; *Knoll v. State*, 55 Wis. 249.

<sup>1</sup> *De Saily v. Morgan*, 2 Brod. & B. 286, 288.

<sup>2</sup> 2 Phil. Ev. \*964, citing 2 Brod. & B. 288; *Print. Evid.* 337. S. P., *Romertz v. East River Nat. Bank*, 49 N. Y. 577.

ness is in existence, and within reach of the cross-examining counsel, *i.e.*, where it can be produced at the trial. If it be lost, or its production cannot be procured by the ordinary method, the rule does not apply. In such a case, the only method of impeaching the witness is by a resort to secondary evidence, and, as in other cases, the necessity of resorting thereto makes such evidence admissible. Thus it is held that where the minutes of a witness' testimony at a former trial have been lost, he may, if he tells a different story at the second trial, be impeached by proving the contents of such lost minutes by parol.<sup>1</sup> So, if a witness swore at a former trial, that a written memorandum then produced by him was made by himself at the time, and such paper has been since lost, he may be impeached by parol proof that such lost paper was not in his handwriting.<sup>2</sup>

Regularly, in such cases, proof of the loss or destruction of the writing, or of the fact that it is not in the possession or within the reach of the cross-examining counsel, should first be adduced, before cross-examining the witness as to its contents, with a view to afterwards discredit him; but inasmuch as in some cases the introduction of such antecedent proof might occasion great inconvenience, by disturbing the regular progress of the cause, and distracting the attention, the court has, and in proper cases will exercise, the power, either to admit, in the first instance, the witness' statement of the contents of the writing, or to reserve the right of cross-examining as to its contents, until the time has arrived when the counsel on the opposite side shall enter upon his case.<sup>3</sup>

§ 208. **Cross-Examination as to Previous Statements must**

<sup>1</sup> *Pearce v. Farr*, 2 Sm. & M. (Miss.) 54.

<sup>2</sup> *Com. v. Hunt*, 4 Gray (Mass.) 421.

<sup>3</sup> In some older cases in England the giving such antecedent proof has been considered irregular (*Graham v. Dyster*, 2 Stark. 23; *Sideways v. Dyson*, Id. 49); but more recently such course has been frequently adopted. Thus, in a criminal case (*R. v. Sheldard*, 9 Car. & P. 277), where it was proposed to cross-examine a witness as to a statement made by him in his deposition before a committing magistrate, which was lost, the loss was

proved, and secondary evidence of the contents of the deposition was given before the witness was cross-examined. See *Davies v. Davies*, 9 Car. & P. 252. So, also, counsel have been permitted, during the cross-examination of an adverse witness, to call upon the opposite party to produce a document which he has received notice to produce (*Calvert v. Flower*, 7 Car. & P. 386), or to call a person to do so, who has been served with a *subpœna duces tecum* (*Atty.-General v. Bond*, 9 Id. 189).

show whether they were in Writing or in Words.—Another question put to the judges in the Queen's Case, was "Whether counsel in cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words."<sup>1</sup> To this, the judges answered through Abbott, C. J., that the witness could not properly be asked, on cross-examination, whether he had *written* such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing: they considered also, that if the witness were asked whether he had *represented* such a thing, they should direct the counsel to ask whether the representation had been made *in writing* or by words; if the counsel should ask whether it had been made *in writing*, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had *said* so and so, the counsel would undoubtedly have a right to put that question.

§ 209. **Contradiction not allowed where Former Statement is Impertinent or Immaterial.**—(1) *The general rule.* The books teem with applications of the *proviso* to the rule we have just been considering, that the statements as to which a witness can be contradicted must be material and relevant to the issue on trial;<sup>2</sup> if the witness is cross-examined as to former statements which are impertinent or immaterial to the issue, his answers are conclusive, and cannot be contradicted for the purpose of impeaching him.<sup>3</sup> But it is within the

<sup>1</sup> 2 Brod. & B. 292; Print. Ev. p. 446.

<sup>2</sup> United States v. Dickinson, 2 McLean (U. S.) 325; Marx v. Bell, 48 Ala. 497; Washington v. State, 63 Ala. 189; People v. Furtado, 57 Cal. 345; Fogelman v. State, 32 Ind. 145; Madden v. Koester, 52 Iowa, 692; State v. Benner, 64 Me. 267; Davis v. Keyes, 112 Mass. 436; Kaler v. Builders' & C. Ins. Co., 120 Mass. 333; Howard v. Patrick, 43 Mich. 121; State v. Staley, 14 Minn. 105; State v. Spaulding, (Minn.) 25 N. W. Rep. 793; Harper v. Indianapolis & C. R. R. Co., 47 Mo. 567; Gandolph v. Appleton, 40 N. Y. 533; Goodall v. State, 1 Oreg. 333; Clinton v. State, 33 Ohio St. 27; Hen-

derson v. State, 1 Tex. App. 432; Brite v. State, 10 Id. 368; and many others to same effect.

<sup>3</sup> United States v. White, 5 Cr. C. C. (U. S.) 38; United States v. Neverson, 1 Mackey (U. S.) 152; Rosenbaum v. State, 33 Ala. 354; Blakey v. Blakey, Id. 611; Seale v. Chamblis, 35 Ala. 19; Haley v. State, 63 Ala. 83; People v. McKeller, 53 Cal. 65; People v. Bell, Id. 119; Beekman v. Skaggs, 59 Cal. 541; McKeone v. People, 6 Colo. 346; Winton v. Meeker, 25 Conn. 456; Wilkinson v. Davis, 34 Ga. 549; Cokely v. State, 4 Iowa, 477; Ware v. Ware, 8 Greenl. (Me.) 42; Davis v. Robey, 64 Me. 427; Goodhand v. Benton, 6

sound discretion of the trial judge to allow the cross-examiner to put questions not relevant to the issue, for the purpose of impairing the credit of the witness with the jury,<sup>1</sup> otherwise than by contradicting him;<sup>2</sup> as, for instance, when the counsel desires to exhibit the character of the witness to the jury.<sup>3</sup> Such departure from the rule is sometimes taken in important criminal cases; and the court may submit it to the jury in such a case, whether, on the whole evidence, they believe the main fact testified to by the witness.<sup>4</sup> And the rule is confined strictly to testimony introduced on cross-examination, not applying to that adduced by the opposite party.<sup>5</sup>

(2) *What statements are material and subject to contradiction.* In determining what matters are pertinent and material to the issue, and what are merely collateral thereto, the test is this: if the answer of the witness is a matter which the cross-examining party would be allowed on his part to prove in evidence; if it have such a connection with the issue that such party would be allowed to give it in evidence, — then it is a matter in which the witness may be contradicted.<sup>6</sup> Thus,

Gill & J. (Md.) 481; *Wolfe v. Harver*, 1 Gill (Md.) 84; *Com. v. Farrar*, 10 Gray (Mass.) 6; *People v. Knapp*, 42 Mich. 267; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Tibbetts v. Flanders*, 18 N. H. 284; *Plato v. Reynolds*, 27 N. H. 586; *Dewey v. Williams*, 43 N. H. 384; *Sumner v. Crawford*, 45 N. H. 416; *Carpenter v. Ward*, 30 N. Y. 243; *People v. Ware*, 92 N. Y. 653; s. c., 29 Hun, 473; *Morgan v. Frees*, 15 Barb. (N. Y.) 352; *Rosenweig v. People*, 63 Id. 635; s. c., 6 Lans. 462; *Crounse v. Fitch*, 1 Abb. (N. Y.) App. Dec. 475; s. c., 14 Abb. Pr. 346; *Green v. Rice*, 33 N. Y. Superior, 292; *People v. Cox*, 21 Hun (N. Y.) 47; *Stape v. People*, Id. 399; *Hilsey v. Palmer*, 32 Id. 472; *Clark v. Clark*, 65 N. C. 655; *State v. Elliott*, 68 N. C. 124; *State v. Patterson*, 74 N. C. 157; *State v. Roberts*, 81 N. C. 605; *Hildeburn v. Curran*, 65 Pa. St. 59; *Hester v. Commonwealth*, 85 Pa. St. 139; *Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *State v. Thibreau*, 30 Vt. 100; and many others.

But, it seems, if the question is in any wise material to the issue, his

answer can be contradicted. *Smith v. Henry*, 2 Bailey (S. C.) 118; *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Ortez v. Jewett*, 23 Ala. 662; *Commonwealth v. Buzzell*, 16 Pick. (Mass.) 153; *Derby v. Gallup*, 5 Minn. 119; *Harris v. Wilson*, 7 Wend. (N. Y.) 57; *Schenly v. Commonwealth*, 36 Pa. St. 29; *Noonan v. Ilsley*, 22 Wis. 27; *Hicks v. Stone*, 13 Minn. 434. See *La Beau v. People*, 34 N. Y. 223.

<sup>1</sup> *State v. McCartney*, 17 Minn. 76.

<sup>2</sup> *McKeone v. People*, 6 Colo. 346.

<sup>3</sup> *Berry v. People*, 1 N. Y. Cr. 43; *affirmed*, Id. 57.

<sup>4</sup> *Powers v. Leach*, 26 Vt. 270.

<sup>5</sup> *State v. Sargent*, 32 Me. 429. See also *Welch v. Franklin Ins. Co.*, 23 W. Va. 288.

<sup>6</sup> Per Pollock, C. B., in *Attorney-General v. Hitchcock*, 1 Exch. 91, 99, who, continuing, remarked: "Or it may be well put, or perhaps better, in the language of my brother Alderson (during the argument), that, if you ask a witness whether he has said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testi-



it has been held that a witness may be impeached by showing (he having denied it) that he had endeavored to suborn witnesses to give false evidence;<sup>1</sup> or had used revengeful or spiteful language towards the cross-examining party;<sup>2</sup> or that he had offered to procure testimony for the party cross-examining him, for a money consideration;<sup>3</sup> or had solicited the aid of certain persons in effecting the escape of the prisoner on trial;<sup>4</sup> or had made certain threats against the man for whose murder the prisoner is on trial;<sup>5</sup> or (being a witness for the defence), that he had said the accused was "a worthless fellow";<sup>6</sup> or (testifying as a subscribing witness in support of a will), that he had said the will "was not worth a snap of his fingers and might be broken."<sup>7</sup>

So, also, it has been held that an immoral relationship existing between a female witness and the party calling her may be shown, she having denied such relation;<sup>8</sup> that in an action where the question turned upon the consideration paid for

mony, then you may call another witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he made on oath in the witness-box is not true." Alderson, B., himself, laid down the rule in the same case,\* as follows: "A witness may be asked any question, which, if answered, would qualify or contradict some previous part of that witness' testimony, given on the trial of the issue; and if that question is so put to him and answered, the opposite party may then contradict him, and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness' testimony, and so removes it. It is true the effect of the contradiction is something beyond that, as tending to show that no part of the witness' testimony can be relied on; but the effect would be the same, if the question had been answered in the affirmative. Now the question is this: Can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material

to the issue; and, if he denies it, you may prove that fact, as you are at liberty to prove any fact material to the issue; and, in that case, though it may not be thought necessary to put the question previously to the witness, yet it would be but just to do so."

<sup>1</sup> Trial of Lord Stafford, 7 How. St. Tr. 1400. S. P., *Morgan v. Frees*, 15 Barb. (N. Y. 352; *Newton v. Harris*, 6 N. Y. 345. *Contra*, *Harris v. Tippet*, 2 Campb. 637.

<sup>2</sup> *R. v. Yewin*, 2 Campb. 638 n.; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Emerson v. Stevens*, 6 Id. 112. See also *Munden v. Bailey*, 70 Ala. 63; *Phoenix v. Castner*, 108 Ill. 207.

<sup>3</sup> *Lewis v. Steiger* (Cal.), 8 West Coast Rep. 434. See also *Tullis v. State*, 30 Ohio St. 200.

<sup>4</sup> *Butler v. State*, 7 Tex. App. 635.

<sup>5</sup> *Gaines v. Commonwealth*, 50 Pa. St. 319; *People v. Williams*, 18 Cal. 187.

<sup>6</sup> *Mimms v. State*, 16 Ohio St. 221.

<sup>7</sup> *Beaubien v. Cicotte*, 12 Mich. 459. S. P., *Nuckols v. Jones*, 8 Gratt. (Va.) 267,

<sup>8</sup> *Thomas v. David*, 7 Car. & P. 350.

\* *Ibid.* 102.

discounting the bill in suit, what a witness said on a former trial between the same parties respecting another bill, discounted at the same time and under the same circumstances, and denies having said, could be proved.<sup>1</sup> Again, where the question was whether a sale was in fraud of a certain creditor, it may be shown that he had previously fixed the amount of his claim at a less sum than he swears it to be at the trial.<sup>2</sup> In a trial for bigamy, the alleged second wife having testified that she had never been married to the defendant, her previous admissions to the contrary may be proved.<sup>3</sup>

(3) *What statements are immaterial, impertinent, or collateral, and not provable to contradict the witness.* It has been held that a witness having denied that he had been paid for coming from another State to testify, his admission to the contrary was not provable;<sup>4</sup> that a witness having denied on cross-examination that he had attempted to dissuade another witness from attending the trial, it could not be shown that he had done so;<sup>5</sup> that the deposition of a witness in another cause, stating as facts, circumstances pertinent then, but not so in the present case, cannot be read to contradict him;<sup>6</sup> that a witness on a trial for burglary who, upon direct examination, testified only that she discovered the accused in her house in the night time, could not be asked, upon cross-examination, if she had not subsequently stated that she did not think defendant intended to steal anything.<sup>7</sup>

§ 210. **Showing Previous Expressions of Opinion Inconsistent with Witness' Testimony.** — The statement sought to be drawn out on cross-examination, with a view to show a contradictory statement by the witness before the trial, must not only relate to the issue, but it must be a matter of fact, and not

<sup>1</sup> Meagoe v. Simmons, 3 Car. & P. 76.

<sup>2</sup> Couillard v. Duncan, 6 Allen (Mass.) 440.

<sup>3</sup> State v. Johnson, 12 Minn. 476. For further like illustrations, see State v. McQueen, 1 Jones (N. C.) L. 177; Commonwealth v. Lamberton, 2 Brews. (Pa.) 565.

<sup>4</sup> State v. Patterson, 2 Ired. (N. C.) L. 346.

<sup>5</sup> Harris v. Tippet, 2 Campb. 637. This case seems to conflict with the

rule laid down in Lord Stafford's case, 7 How. St. Tr. 1400, and is criticised by Mr. Phillips in his Treatise on Evidence (Vol. II. p. \*972). See also Attorney-General v. Hitchcock, 1 Exch. 91.

<sup>6</sup> Lamalere v. Caze, 1 Wash. (U. S.) 413.

<sup>7</sup> State v. Maxwell, 42 Iowa, 208. For further instances, see Atkins v. State, 16 Ark. 568; Com. v. Kennon, 130 Mass. 39; Nation v. People, 6 Park (N. Y.) Cr. 258.

merely a former opinion of the witness in relation to the matter in issue, inconsistent with a different opinion appearing to be now held by him from his testimony;<sup>1</sup> unless the matter be one upon which the opinion of the witness be admissible in evidence, in which event he may be contradicted by proof of a previous expression of an opinion contrary to that expressed by him upon the stand.<sup>2</sup> Thus the evidence of an expert may be contradicted by showing that at another time he had expressed a different opinion;<sup>3</sup> and former opinions of ordinary witnesses, on questions of value, identity, handwriting, sanity, and the like, may be proved for the purpose of throwing discredit on their testimony on those points.<sup>4</sup>

<sup>1</sup> The case in which this question arose was an action on a marine policy upon a ship. The broker who effected the policy for the plaintiff, being sworn as a witness for the defendant, stated that he omitted to make a certain disclosure which it was now contended was material; and therefore the omission would avoid the policy. On cross-examination, he denied that he had, shortly after effecting the policy, declared his opinion that the underwriters had not (in their defence) a leg to stand on. The plaintiff called a witness to contradict this, by showing that he had said so. Tindal, C. J.: "It seems to me hardly to come within the rule relating to a matter directly connected with the issue. If there had been any contradiction of the broker's assertion of a matter of fact, as to whether he had or had not made the communication, it might have been received. But this is only

a contradiction on a matter of judgment, and I think it not receivable." *Elton v. Larkins*, 5 Car. & P. 385. This decision will suggest to the mind of the experienced practitioner the question, so often put to a material witness, whether he had not declared that he knew nothing concerning the cause on trial; and the value which an answer to such an inquiry, one way or the other, should have in the eye of judicial inquiry. 2 Phil. Ev. \*903.

<sup>2</sup> *Daniels v. Conrad*, 4 Leigh (Va.) 401-406.

<sup>3</sup> *Sanderson v. Nashua*, 44 N. H. 492.

<sup>4</sup> *Dalton's Appeal* (Mich.), 26 N.W. Rep. 539. See also *Cochran v. Amsden* (Ind.) 3 N. East. Rep. 934; *Rucker v. Beaty*, 3 Ind. 70; *Lane v. Bryant*, 9 Gray (Mass.) 245; *Hubbell v. Bissell*, 2 Allen (Mass.) 196; *City Bank v. Young*, 43 N. H. 457; *Holmes v. Anderson*, 18 Barb. (N. Y.) 420; *Ripon v. Bittel*, 30 Wis. 614.

## CHAPTER XIV.

### DISPROVING OR IMPEACHING THE EVIDENCE OF ONE'S OWN WITNESS.

§ 211. The General Rule forbidding Impeachment.

§ 212. Its Scope and Extent.

§ 213. Its Limits and Exceptions.

§ 214. Fact sworn to may be disproved.

§ 215. How far the Rule applies where One Party calls the Adverse Party.

§ 216. Unfriendly or Hostile Witnesses.

§ 211. **The General Rule forbidding Impeachment.** — A party who voluntarily puts a witness on the stand to testify in proof of his cause, thereby vouches for the witness as a person worthy of belief, and is, as a general rule, thereafter estopped from impeaching such witness, or assailing his character for truth and veracity.<sup>1</sup> He can neither impeach him by general evidence of character,<sup>2</sup> nor by proof of contradictory statements,<sup>3</sup> or interest in the result of the trial.<sup>4</sup> The removal of this salutary restriction on the right of impeachment would enable the party calling a witness to destroy him if his testimony happened to be adverse, and to make him a good witness if his testimony suited his purpose, — a condition of things not conducive to the proper administration of justice.<sup>5</sup>

<sup>1</sup> *Rockwood v. Poundstone*, 38 Ill. 199; *Griffin v. Wall*, 32 Ala. 149; *Thorn v. Moore*, 21 Iowa, 285; *Winder v. Diffenderfer*, 2 Bland (Md.) 166; *Pollock v. Pollock*, 71 N. Y. 137; *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564; *Perry v. Massey*, 1 Bail. (S. C.) 32; *Fillmore v. Union Pac. R. R. Co.*, 2 Wyom. T. 94.

<sup>2</sup> *Coulter v. American &c. Exp. Co.*, 56 N. Y. 585.

<sup>3</sup> *Coulter v. American &c. Exp. Co.*, *supra*; *People v. Safford*, 5 Den. (N. Y.) 112; *Sanchez v. People*, 4 Park. (N. Y.) Cr. 535; s. c., 22 N. Y. 147.

<sup>4</sup> *Helm v. Handley*, 1 Litt. (Ky.)

219; *Roundtree v. Tibbs*, 4 Hayw. (Tenn.) 108.

<sup>5</sup> B. N. P. 297. Mr. Phillips in his admirable treatise on evidence says, as to this point: "It is clear a party is not to be sacrificed to his witness; he is not represented by him, nor ought he to be identified with him, or bound by all he may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and that witness in giving

§ 212. **Its Scope and Extent.**—In applying this salutary rule, it has been held, that where a party calls two witnesses, the second of whom contradicts the first, he cannot recall the first witness to disprove what the second has said;<sup>1</sup> that where the party's own witness has sworn he was conscious and recollected what he did on a certain occasion, the party cannot show that he was, in fact, insane at the time in question;<sup>2</sup> that a party cannot prove that his own witness had, at different times, made declarations at variance with his testimony,<sup>3</sup> or even ask him if he had not made such contradictory statements,<sup>4</sup> or if he is not interested in the suit.<sup>5</sup>

The rule is the same where depositions are used, and where both parties join in taking the deposition of a witness, neither can impeach his credibility;<sup>6</sup> but where the party taking the deposition refuses to use it, and the adverse party reads it, the deponent becomes the witness of the party reading the deposition, and may be impeached by the other party.<sup>7</sup> In analogy with this doctrine, where one party calls a witness, and after examination and cross-examination, he is recalled by the party adverse to the party originally calling him, he

evidence disappoints or deceives him, he ought not to be allowed to prove his infamy for the purpose of destroying the effect of his evidence. Knowing the infamy of his character, he had more reason to suspect and disbelieve than to trust him: nor has he any just ground to complain that his cause is prejudiced by false evidence, as he could expect nothing less from such a witness; and he suffers not unjustly for using a witness whom he knew to be infamous. But if a party, not acting himself a dishonest part, is deceived by his witness—or if a witness, professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary—is the party to be restrained from laying the true state of the case before the court? The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known." 2 Phil. Ev. \*081.

<sup>1</sup> *Rapp v. Le Blanc*, 1 Dall. (U. S.) 63. See also *Delisle v. Priestman*, 1 Browne (Pa.) 176, 182; *Cowden v. Reynolds*, 12 S. & R. (Pa.) 281. See *infra*, § 214.

<sup>2</sup> *Montgomery v. Hunt*, 5 Cal. 366.

<sup>3</sup> *Chamberlain v. Sands*, 27 Me. 458; *People v. Jacobs*, 49 Cal. 384; *Commonwealth v. Starkweather*, 10 Cush. (Mass.) 59; *Adams v. Wheeler*, 97 Mass. 67; *Brewer v. Porch*, 2 Harr. (N. J.) 377; *Stearns v. Mechanics' Bank*, 53 Pa. St. 490. To the contrary, *Champ v. Commonwealth*, 2 Metc. (Ky.) 17; *Delisle v. Priestman*, 1 Browne (Pa.) 176. And see *McDowell v. General Ins. Co.*, 10 La. Ann. 16, and *infra* in this section.

<sup>4</sup> *Com. v. Welsh*, 4 Gray (Mass.) 535; *Moore v. Chicago & C. R. R. Co.*, 59 Miss. 243.

<sup>5</sup> *Fairly v. Fairly*, 38 Miss. 280.

<sup>6</sup> *Story v. Saunders*, 8 Humph. (Tenn.) 663.

<sup>7</sup> *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343; *Cudworth v. South Carolina Ins. Co.*, 4 Rich. (S. C.) 416.

becomes the latter's witness, and cannot be discredited by him;<sup>1</sup> and the same rule applies where the witness, upon cross-examination, is inquired of regarding a new subject, not connected with any matter for which his evidence was offered by the other side, but for the benefit of the cross-examining party.<sup>2</sup>

Most of the difficulty hitherto experienced by the courts in applying the rule of evidence we are now considering, has been on the question whether a party may show that a witness called by him, and who has testified against him, has made at other times a statement contrary to that made by him at the trial. The better opinion seems to be that, ordinarily, this cannot be done; that the party having called the witness must take him for better or for worse, and must be bound by all his statements on the stand; that he cannot contradict him except by proving *facts bearing upon the issue*,<sup>3</sup> unless the witness *has deceived the party*, promising to testify one way and swearing another, and the party himself is entirely innocent, calling him in good faith, and fully believing him to be a friendly and not a hostile witness. In such cases, according to what the writer deems the weight of authority, the party (on the ground of surprise) may show the facts, *i.e.*, that the testimony of the witness is contrary to what he disclosed on his preparatory examination, or to what the party calling him had reason to believe he would swear to, or anything else tending to show that the witness had deceived him. Any other course would seem to place an innocent litigant at the mercy of a designing and unscrupulous witness.<sup>4</sup>

<sup>1</sup> *Com. v. Hudson*, 11 Gray (Mass.) 64; *Craig v. Grant*, 6 Mich. 447. Compare *State v. Taylor*, 88 N. C. 694. *Contra*, *State v. Jones*, 64 Mo. 391.

<sup>2</sup> *Fairchild v. Bascom*, 35 Vt. 398; *First Baptist Church v. Brooklyn Ins. Co.*, 23 How. (N. Y.) Pr. 448. To the contrary, see *Lewis v. Hodgdon*, 17 Me. 267. See also *Jones v. People*, 2 Colo. 351; *Artz v. Chicago &c. R. R. Co.*, 44 Iowa, 284; *Beebe v. Tinker*, 2 Root (Conn.) 160.

<sup>3</sup> See *infra*, § 214.

<sup>4</sup> A review of the cases upon this

interesting topic would unduly swell the limited space available for its discussion here. A mere citation of some of them is all that can be attempted.

The following hold that evidence of the previous contradictory statement cannot be given: *Holdsworth v. Mayor of Dartmouth*, 2 Moo. & R. 153; *Winier v. Brett*, Id. 357; *Allan v. Hutchins*, Id. 358 n; *Queen v. Ball*, 8 C. & P. 745; *Queen v. Farr*, Id. 768; *R. v. Moran*, *Jebb*, C. C. 91; *Ir. Cr. R.* 506 n (a).

The following decide that such

§ 213. *Its Limits and Exceptions.*—There are some exceptions to this rule forbidding a party to disprove or impeach the testimony of his own witness. The principal ones are: (1) Where the party is *compelled to call the witness* in order to make out his case; (2) where the object is to show the true facts, not merely to discredit the witness; (3) where the witness is an adverse party; and (4) where he is hostile or unfriendly. The first of these exceptions will be consid-

evidence is admissible under the circumstances stated in the text: *King v. Olroyd*, R. & R. C. C. 88; *Ewer v. Ambrose*, 3 Barn. & C. 749; *Bernasconi v. Fairbrother*, cited in 1 Moo. & R. 427; *Wright v. Beckett*, Id. 414; *Dunn v. Aslett*, 2 Id. 122; *Rice v. New England Marine Ins. Co.*, 4 Pick. (Mass.) 439; *Brown v. Bellows*, Id. 179; *State v. Norris*, 1 Hayw. (N. C.) 437, 438; *Bank of Northern Liberties v. Davis*, 6 Watts & S. (Pa.) 285; *Melluish v. Collier*, 15 Q. B. 878; *Hemingway v. Garth*, 51 Ala. 530; *Blackburn v. Com.*, 12 Bush (Ky.) 181.

Mr. Phillips says: "The chief objection to the proposed evidence appears to be this, that a party after calling a witness as a *witness of credit* shall not be allowed to *discredit* him. At first sight, this has the semblance of a principle of plain dealing. But let the same proposition be expressed in other terms—as near the facts of the case, if not nearer—and let it run thus: A party, after giving credit to a witness for speaking truth, shall not, although deceived by him, be allowed to show that the witness has deceived. The proposition so expressed might, to an unlearned reader, appear scarcely consistent with the principles of justice. The proposition asserts a *fact* as the foundation of the rule,—that a party by calling a witness places him in the box as a *witness of credit*. But is this the fact? The party does not vouch for his credit, nor ought he to be treated as if he had given such voucher. He may know little, perhaps nothing, of the witness's character, or may believe

it to be doubtful, and yet may not unreasonably give him credit for the truth of his statements,—not however intending thereby to vouch for him as a *witness of credit*; and if in such cases the witness deceives him, his deceit ought to be exposed, and his evidence weighed in the scales of truth. But, it is said, he shall not give evidence to *discredit* his own witness. The answer to this is, that the witness ought not to receive more credit than he deserves, and if he has given different statements of the same transactions, no wrong is done to him by proving them. Whether such proof may discredit him at all, or to what extent, the jury are to determine: the object of the party may be to discredit, and the witness may deserve to be discredited; but the duty of the judge is to search out the truth, and to take care that the exact degree of credit due to each witness, and not more, shall be fairly and justly apportioned." 2 Phil. Ev. \*995.

In England, and several of the States, proof of the previous contrary statement is rendered admissible by statute, the proper foundation having first been laid. 17 & 18 Vict. c. 125; *Dean v. Knight*, 1 Fost. & F. 433; *Jackson v. Thomas*, 10 W. R. 42; *Mass. Pub. St.*, c. 169, § 22; *Blackburn v. Com.*, 12 Bush (Ky.) 181; *Hemingway v. Garth*, 51 Ala. 530; *Brooks v. Weeks*, 121 Mass. 433; *White v. State*, 10 Tex. App. 381; *Com. v. Donahue*, 133 Mass. 407; *People v. De Witt* (Cal.), 9 W. C. Rep. 696. See also *Hildreth v. Shepard*, 65 Barb. (N. Y.) 265.

ered here; the others will form the subjects of subsequent sections.<sup>1</sup>

Where the witness is not of the party's own selection, but is forced upon him, as it were, as the only person by whose testimony a material fact can be proved,—as in the case of a subscribing witness to a deed, or will, or the like,—it would seem that he should not be considered the witness of the party calling him, within the meaning of the rule; and the latter should be permitted to impeach him to the same extent as he could, if he had been called by his adversary.<sup>2</sup> And it has been held by courts of the highest respectability, that in such cases the rule does not apply.<sup>3</sup> Thus, where in a contested will case, the proponent produced the three subscribing witnesses, examining two, but declining to examine the third, until ordered to do so by the court, and then only as to the formality of the execution of the will,—the witness having sworn on cross-examination, that the testator was insane at the time of executing the will,—it was held that the proponent could impeach the witness by showing his previous declarations, to the effect that the testator was of sound mind when the will was executed.<sup>4</sup> In analogy with this principle, where a party is taken by surprise by the witness,—as where being called under a well-founded supposition that he will swear to certain facts, he testifies to other and contrary facts, or gives other unexpected testimony,—the party may interrogate him in respect to his previous declarations inconsistent with his testimony, for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out explanation of apparent inconsistency.<sup>5</sup> This is also allowed in criminal cases, where the testimony of the witness is as to facts which are injurious to the party calling him.<sup>6</sup>

§ 214. **Fact sworn to may be disproved.** — “But if a wit-

<sup>1</sup> §§ 214–216.

<sup>2</sup> 2 Evans' Poth. 232, 266.

<sup>3</sup> *Dennett v. Dow*, 17 Me. 19; *Shorey v. Hussey*, 32 Me. 579; *Olinde v. Saizan*, 10 La. Ann. 153; *Williams v. Walker*, 2 Rich. (S. C.) Eq. 291. But see *Whitaker v. Salisbury*, 15 Pick. (Mass.) 544, 545, *Brown v.*

*Bellows*, 4 Id. 179; *Brown v. Buckley*, 1 McCart. (N. J.) 294.

<sup>4</sup> *Thornton v. Thornton*, 39 Vt. 122; *Harden v. Hayes*, 9 Pa. St. 151.

<sup>5</sup> *Bullard v. Pearsall*, 53 N. Y. 230. *S. P.*, *McDaniel v. State*, 53 Ga. 253.

<sup>6</sup> *Thomas v. State*, 14 Tex. App. 70; *Tyler v. State*, 13 Id. 205; *Shannon v. State*, Id. 139.



ness state facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental, and consequential only.”<sup>1</sup> The rule is thus expressed in the American cases: Although a party may not discredit his own witness by testimony as to his general character, he may give evidence to contradict any particular and material *fact* to which the witness has testified.<sup>2</sup> He may show that the witness is mistaken or that the *facts are different from the version he gives of them*;<sup>3</sup> i.e., for the purpose of upholding his cause of action or defence (not for the purpose of impeaching the witness), he may show *how the fact really is*.<sup>4</sup> If he calls a witness to prove a particular fact, and fails in establishing it by him (or if he disproves it), the fact may nevertheless be proved by another witness, or the first one's account be shown to be incorrect. A party may always correct his own witness, though by directly contradicting him.<sup>5</sup> If such evidence were to be excluded, the conse-

<sup>1</sup> B. N. P. 397.

<sup>2</sup> United States v. Watkins, 3 Cranch (U. S.) C. Ct. 441; Norwood v. Kenfield, 30 Cal. 393; Rockwood v. Poundstone, 38 Ill. 199; Thorn v. Moore, 21 Iowa, 285; Burkhalter v. Edwards, 16 Ga. 593; Cronan v. Roberts, 65 Ga. 678; Gray v. Gray, 3 Litt. (Ky.) 465; Brown v. Osgood, 25 Me. 505; Shelton v. Hampton, 6 Ired. (N. C.) L. 216; Bradford v. Bush, 10 Ala. 386; Warren v. Gabriel, 51 Ala. 235; Hall v. Houghton, 37 Me. 411; Wolfe v. Hauver, 1 Gill (Md.) 84; Brolley v. Lapham, 13 Gray (Mass.) 294; Whitrey v. Eastern R. R. Co., 9 Allen (Mass.) 364; Olmstead v. Winsted Bank, 32 Conn. 278; Brown v. Wood, 19 Mo. 475; Seavy v. Dearborn, 19 N. H. 351; Swamscot Machine Co. v. Walker, 22 N. H. 457; Skellinger v. Howell, 3 Halst. (N. J.) 310; Lawrence v. Barker, 5 Wend. (N. Y.) 301; Winston v. Moseley, 2 Stew. (Ala.) 137; Thompson v. Blanchard, 4 N. Y. 303; Hunter v. Westell, 84 N. Y. 549; Hunt v. Fish, 4 Barb. (N. Y.) 324;

Pickard v. Collins, 23 Id. 444; People v. Skeehan, 49 Id. 217; Keutgen v. Parks, 2 Sandf. (N. Y.) 60; Parsons v. Suydam, 3 E. D. Smith (N. Y.) 276; Bok v. Vincent, 12 Abb. (N. Y.) Pr. 137; Bemis v. Kyle, 5 Abb. (N. Y.) Pr. n. s. 232; Gibbs v. Hyler, 41 N. Y. Superior, 190; Hice v. Cox, 12 Ired. (N. C.) L. 315; Stockton v. Demuth, 7 Watts (Pa.) 39; Farr v. Thompson, Cheves (S. C.) 37.

<sup>3</sup> Sisson v. Conger, 1 Thomp. & C. (N. Y.) 564.

<sup>4</sup> Sewell v. Gardner, 48 Md. 178; Spencer v. White, 1 Ired. (N. C.) L. 236. See also Skipper v. Georgia, 50 Ga. 63; Platt v. Thorn, 8 Bosw. (N. Y.) 574; Bank of Kentucky v. Shier, 4 Rich. (S. C.) 233, which latter case seems to lean a little in the contrary direction.

<sup>5</sup> Per Savage, C. J., in Lawrence v. Barker, 5 Wend. (N. Y.) 305; Jackson d. Hopkins v. Leek, 12 Id. 105; De Lisle v. Priestman, 1 Browne (Pa.) 176; s. c., on error, Id. 183 n; Cowden v. Reynolds, 12 S. & R. (Pa.) 281; Per Livingston, J., in Steinbach

quences would be most injurious to the administration of justice, as well in criminal as in civil cases.<sup>1</sup>

But the contradiction of the first witness by the second one has not necessarily the effect of repudiating the *whole* of the former witness's testimony: it would be against all justice to require that the whole of a man's testimony should be struck out, because a witness sets him right as to a single fact.<sup>2</sup> Strictly speaking, no part of his evidence is to be struck out; the whole must be for the consideration of the jury, who may believe and adopt a part, or disbelieve and reject the whole.<sup>3</sup> Still even though the effect of such contradiction be to indirectly throw the utmost discredit on the witness, and convince the jury that he has designedly deceived them, still the party will be at liberty to prove such contrary facts. "There is no rule of law by which the truth on such an occasion is to be shut out, and justice perverted."<sup>4</sup>

§ 215. **How far the Rule applies where One Party calls the Adverse Party.**—Whether the application of the rule we are

*v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 131; *Thompson v. Blanchard*, 4 N. Y. 311; *Per Ruffin, J.*, in *Crowell v. Kirk*, 3 Dev. (N. C.) 357. The contrary was held by an early case in New Jersey, on the ground that the contradiction would be to discredit the party's first witness, and thus violate the rule that the party calling the witness shall not impeach him. *Beak's Ex'rs v. Birdsall, Coxe* (N. J.) 12. But that is now overruled or disregarded, and the courts there act upon the English rule. *Skellinger v. Howell*, 3 Halst. (N. J.) 310. See also, apparently to the contrary, *Rapp v. Le Blanc*, 1 Dall. (U. S.) 63.

<sup>1</sup> See, as to what facts are *material* within this rule allowing contradiction, *Friedlander v. London Assur. Co.*, 4 Barn. & Ad. 193; *Perry v. Massey*, 1 Bail. (S. C.) 32; *Alexander v. Gibson*, 2 Campb. 556. In the case last cited the question was, whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, and the servant swore, on being called by the plaintiff, that he had not given any

warranty. Lord Ellenborough allowed the plaintiff to call another witness, to prove that at the time of the sale the servant had expressly warranted its soundness. "There can be no rule of law," said Lord Ellenborough, "by which the truth on such an occasion is to be shut out, and justice perverted." In this manner a statement of facts by the former witness may be disproved to any extent, and even the whole of his evidence may be discredited.

<sup>2</sup> *Bradley v. Ricardo*, 8 Bing. 57.

<sup>3</sup> The court is not bound to believe or disbelieve all that a party's witness says for or against him, but may reject such portion of his testimony against the party as shall appear liable to objection. *Per Livingston, J.*, in *Stokes v. Mowatt*, 1 U. S. Law Jour. 305, 325, 326.

<sup>4</sup> 2 Phil. Ev. \*985. Where the evidence shows that the witness was mistaken, it does not affect the rest of his testimony any further than as it serves to show a defect of memory. *Hall v. Houghton*, 37 Me. 411; *Brennan v. People*, 15 Ill. 511.

now considering is at all affected, and if so, to what extent, by the fact that a witness called by one party and sought to be impeached or contradicted by him is the adverse party, or one of them, is a question upon which the authorities are not in strict accord. It is well settled, however, that such a witness cannot be impeached, by evidence of character, by the party calling him: he becomes such party's own witness within the rule as respects the binding effect of testimony elicited by him.<sup>1</sup> He cannot insist that such witness's testimony be ignored if it happen to disappoint him,<sup>2</sup> or argue from the contradictions in it, that it is false.<sup>3</sup> Where the purpose for which a party calls his adversary to testify is not formal, or where he is not compelled by law to call him, the court must hold the witness credible even upon cross-examination, or on direct examination as a witness for the other side.<sup>4</sup> So long as his answers are responsive to the questions put to him on the direct examination, the party calling him cannot be heard to contradict him; but if he shall depart from a direct and simple response, by stating other or new matter not responsive to the questions, not being introduced for such purpose, but availing himself of such privilege as a witness to testify in his own behalf, his adversary can be heard on such new matter.<sup>5</sup>

Such a witness, it is held in one case, stands in a different position from an ordinary witness: he is necessarily hostile to the party calling him, who is not bound by what he testifies. It may be that he cannot be directly impeached by the party who called him, but he may be freely contradicted, even though this may incidentally discredit him.<sup>6</sup>

Of course, the party may prove facts sworn to by such witness to be otherwise, as he may in the case of any other witness.<sup>7</sup> So if, relying upon his testimony on a former

<sup>1</sup> *Hunt v. Coe*, 15 Iowa, 197; *Thorn v. Moore*, 21 Id. 285; *Paxton v. Boyce*, 1 Tex. 317. See also *Nichols v. White*, 85 N. Y. 531; *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154; *Drennen v. Lindsey*, 15 Ark. 359.

<sup>2</sup> *Dravo v. Fabel* (Pa.) 25 Fed. Rep. 116.

<sup>3</sup> *Tarsney v. Turner*, 2 Flipp. (U. S.) 735.

<sup>4</sup> *Branch v. Levy*, 46 Superior (N. Y.) 428.

<sup>5</sup> *Hester v. Wallace*, 6 Bush (Ky.) 182.

<sup>6</sup> *Dravo v. Fabel*, 25 Fed. Rep. 116. In this case a statute of Pennsylvania is referred to, which allows such a witness to be examined by the party calling him, as if under cross-examination.

<sup>7</sup> *Paxton v. Boyce*, 1 Tex. 317; *supra*, § 214.

trial, he is entrapped by the witness, who changes his testimony, he may contradict him.<sup>1</sup>

§ 216. **Unfriendly or Hostile Witnesses.** — Another well-defined exception to the general rule that a party having called a witness, thereby vouches for him as a person worthy of credit, and must take him “for better or for worse,” and cannot afterwards discredit him, is, where the witness turns out to be an unfriendly, or, as it is generally termed, a “hostile” witness. In such an event the presiding judge has a discretion to permit the party to pursue either or both of two courses: (1) he may cross-examine the witness, though called by himself, and put leading questions to him,<sup>2</sup> and (2) he may impeach or discredit his testimony to the same extent and by the same means as he could do, had the witness been adduced as such by the adversary party: at all events, so far as showing the making by him, out of court, of statements inconsistent with those made upon the stand. This concession to the party is frequently necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause. The objection that a party has no right to put a witness into the box as a person of credit, and afterwards call others to discredit him, proceeds upon the supposition that the party first acted on one principle, and afterwards, being disappointed by the witness, turns round and acts upon another — thus imputing to the party something of double-dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him, and first discovers the deceit at the trial.<sup>3</sup>

In accordance with this principle, it has been held that

<sup>1</sup> *Cox v. Prater*, 67 Ga. 588; see *supra*, § 212. In Kansas, it is held that one party introducing in evidence the deposition of the other is not bound by its statements. He may prove his case by other evidence going to discredit and contradict statements made in the deposition. *Wallach v. Wylie*, 28 Kan. 138. In Pennsylvania, by statute (Act of 1869, § 2) such a wit-

ness may be contradicted by proof of inconsistent statements made out of court, and this, without giving him an opportunity of explanation. *Brubaker v. Taylor*, 76 Pa. St. 83.

<sup>2</sup> See *infra*, Chap. XIV.

<sup>3</sup> 2 Phil. Ev. \*986. See also *supra*, §§ 212, 213, where this branch of the subject has already been partially discussed.

in a criminal case, where the prosecutor calls a witness who proves to be hostile, the prosecution may prove what he said on a former occasion, not as evidence of the facts sought to be proven, but to show that he has made conflicting statements, and thus affect his credibility.<sup>1</sup> But it must be borne in mind that a witness cannot be impeached or examined on the assumption that he is unfriendly before there is any showing to that effect or any evidence from him to warrant it.<sup>2</sup>

<sup>1</sup> Commonwealth v. Morrow, 3 Brews. (Pa.) 402.      <sup>2</sup> People v. Lyons, 51 Mich. 215.

## CHAPTER XV.

### CONFIRMING AND CORROBORATING WITNESSES.

- § 217. The Right to corroborate a Witness. .
- § 218. The Necessity of Corroboration, generally.
- § 219. Where Witness is shown to have falsified.
- § 220. To overcome Answer in Chancery.
- § 221. Competency of Corroborating Evidence.
- § 222. Its Sufficiency and Effect.
- § 223. Sustaining a Witness by Proof of Character.
- § 224. Showing Previous Consistent Statements.
- § 225. Corroboration of Prosecuting Witnesses in Certain Cases.

§ 217. **The Right to corroborate a Witness.** — A party has the unquestioned right to introduce evidence in corroboration of a witness who has been impeached or contradicted, and no exception lies to the admission of such evidence.<sup>1</sup> He may introduce as many witnesses as he deems necessary to prove his side of the issue, and if his opponent brings in contradictory witnesses, he may call others to corroborate those first examined.<sup>2</sup> And the rule is the same where the witness sought to be corroborated was impeached on his own cross-examination only, and not by extraneous evidence.<sup>3</sup> Where plaintiff impeaches defendant's witnesses by evidence in rebuttal, defendant may corroborate them after plaintiff has rested.<sup>4</sup>

Not only may an impeached witness be corroborated by evidence extrinsic to his own, but he may be confirmed by his own testimony taken on re-examination. If, on cross-examination, facts have been elicited which tend to impair his credit, he may, on re-examination, be asked such questions as tend to explain those facts.<sup>5</sup> Thus, where, in a criminal case, the defendant's witnesses were asked, on cross-examina-

<sup>1</sup> *Green v. Gould*, 3 Allen (Mass.) 465.

<sup>2</sup> *Outlaw v. Hurdle*, 1 Jones (N. C.) L. 150.

<sup>3</sup> *Richmond v. Richmond*, 10 Yerg. (Tenn.) 343.

<sup>4</sup> *Wade v. Thayer*, 40 Cal. 578.

<sup>5</sup> *United States v. High wines*, 8 Blatchf. (U. S.) 475. *Contra*, *Dickson v. Sharretts*, 7 La. Ann. 54.

tion, where they came from, — to which they answered that they came from jail, — it was held error to refuse them the privilege of stating upon what charge, and under what circumstances they had been committed to jail.<sup>1</sup> So where, for the purpose of contradicting a witness, his attention is called, on cross-examination, to a communication sent by him to a newspaper, he should be allowed to explain the circumstances under which the communication was written.<sup>2</sup> And the rule is the same where impeachment is attempted by the proof of verbal statements contradicting the witness' testimony;<sup>3</sup> but proof of a detached statement, made previously to the trial by the witness, will not authorize proof of all that he said at the same time, but only of so much as can be connected in some way with the statement proved.<sup>4</sup>

This right to confirm the witness on re-examination extends to cases where the cross-examination is as to facts not in themselves admissible in evidence;<sup>5</sup> this, however, is a departure from general rules of evidence.<sup>6</sup>

But a witness cannot be supported before he has been attacked,<sup>7</sup> though it is always permissible to strengthen a witness' testimony by connected incidents showing its consistency and reasonableness.<sup>8</sup>

§ 218. **The Necessity of Corroboration, generally.** — Whether it be *necessary* to corroborate an unimpeached and uncontradicted witness, is a question which most frequently arises in

<sup>1</sup> *State v. Ezell*, 41 Tex. 35. S. P., *McAffee v. State*, 31 Ga. 411.

<sup>2</sup> *Smith v. Weeks*, 54 Iowa, 411.

<sup>3</sup> See *infra*, § 224; *State v. George*, 8 Ired. (N. C.) L. 324.

<sup>4</sup> *The Queen's Case*, 2 Brod. & B. 297; *Prince v. Samo*, 7 Ad. & E. 627; *overruling* a broader doctrine laid down in the *Queen's Case* by Lord Tenterden.

<sup>5</sup> *Goodman v. Kennedy*, 10 Neb. 270; *State v. Cardoza*, 11 So. Car. 195.

<sup>6</sup> *Mitchell v. Sellman*, 5 Md. 376; *Shedden v. Patrick*, 2 Swab. & Tr. 170. Upon the point as to how much of a previous conversation, a part of which has been gone into on cross-examination, may be elicited from the witness on the re-direct, Mr. Phillips says, "Upon a review, therefore, of the authorities, the correct rule seems to be as follows: That where a state-

ment, forming a part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible, and that there is no difference in this respect between statements made in conversation by a party to the suit, and those made by a third party." 1 Phil. Ev. \*416.

<sup>7</sup> *Hamilton v. Conyers*, 28 Ga. 276; *State v. Rorabacher*, 19 Iowa, 154; *Bryant v. Tidgewell*, 133 Mass. 86; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166.

<sup>8</sup> *Bruton v. State*, 21 Tex. 337.

dealing with the testimony of accomplices — the cases upon that branch of the subject will be examined later on<sup>1</sup> — other cases in which such corroboration is essential are adultery, bastardy, divorce, perjury, seduction, rape, and treason cases,<sup>2</sup> and chancery cases, where a sworn answer is to be overcome.<sup>3</sup> There still remains, however, a class of cases where the testimony of a single witness needs corroboration by other testimony, or confirmation by circumstances in evidence, even though such witness be unimpeached and uncontradicted.<sup>4</sup> Thus the testimony of a too willing witness, as to his “understanding” of a conversation between the parties, if uncorroborated, has been held entitled to no weight;<sup>5</sup> the testimony of a single witness has been deemed overridden by written assignments on a note and mortgage;<sup>6</sup> and, the question being whether certain real estate passed under a deed from a firm “of all and every parcel of real estate heretofore acquired, or now held by them,” the testimony of a single witness, given after a lapse of twelve years, that one of the partners had said that he received the land in payment of a debt due the firm, was held to be insufficient proof to establish such admission.<sup>7</sup>

In all cases where the testimony of one party or his witnesses is explicitly contradicted by that of the other party and his witnesses, the party holding the affirmative of the issue must be corroborated in some manner, or fail.<sup>8</sup>

§ 219. **Where Witness is shown to have falsified.** — The general effect of the maxim, “*falsus in uno falsus in omni*—

<sup>1</sup> See *infra*, Chap. XVI.

<sup>2</sup> See *infra*, § 225.

<sup>3</sup> See *infra*, § 220.

<sup>4</sup> See *supra*, § 195.

<sup>5</sup> *Powell v. Swan*, 5 Dana (Ky.) 1.

<sup>6</sup> *Mann v. Cross*, 9 Iowa, 327.

<sup>7</sup> *Benedict v. Horner*, 13 Wis. 256.

<sup>8</sup> *Shearman v. Hart*, 14 Abb. (N. Y.) Pr. 358. Within this principle the testimony of a state's witness whose credit has been impeached, must be corroborated by proof of a fact tending to show guilt, to justify a conviction. *Martin v. State*, 28 Ala. 71. But see to the contrary, *Riley v. Butler*, 36 Ind. 51.

As to the sufficiency of the uncorroborated evidence of one witness, to

establish a contract, or prove the payment or extinguishment of an item of account, exceeding \$500 in amount, under the laws in force in Louisiana, see *Sieran v. Keenan*, 14 La. Ann. 705; *Jones v. Fleming*, 15 Id. 522; *Collins v. McElroy*, 15 Id. 639; *St. Romes v. New Orleans*, 18 Id. 210; *Brady v. McWilliams*, 19 Id. 433; *Goldsmith v. Friedlander*, 20 Id. 119; *Field v. Harrison*, Id. 411.

A usage of business may be established by the testimony of a single witness. *Robinson v. United States*, 13 Wall. (U. S.) 363; *Jones v. Hoey*, 128 Mass. 585; *Bissell v. Campbell*, 54 N. Y. 353; *Adams v. Pittsburgh Ins. Co.*, 95 Pa. St. 348.



bus," upon the credibility of witnesses who testify falsely in part, has been heretofore considered;<sup>1</sup> and we found that it is within the province of the jury to believe such portions, if any, of such a witness' testimony as they see fit. It was early held that where the testimony considered false by the jury was on an immaterial point, it was competent for them to give their verdict upon his testimony-in-chief upon other points, *if corroborated*.<sup>2</sup> The true rule for the adoption of juries undoubtedly is, that where a witness knowingly and wilfully swears falsely in a material matter, his testimony should be rejected entirely, unless corroborated by the facts and circumstances of the case, or other credible evidence,<sup>3</sup> and the mere fact that his evidence is corroborated in some other immaterial respects will not restore the credibility of such a witness.<sup>4</sup>

§ 220. **To overcome Answer in Chancery.**—It is a familiar rule of chancery pleading and practice, that the explicit denials in the sworn answer of a defendant, to the allegations of a bill so framed as to compel an answer on oath, cannot be so overcome by the uncorroborated evidence of a single witness testifying in support of the bill, as to afford a sufficient basis for a decree in favor of the complainant.<sup>5</sup> The civil law rule formerly followed by courts of equity, and still in force in Louisiana, required the oath of two witnesses, or, at the least, the testimony of one witness, strongly corroborated by circumstantial or written evidence, to overcome the answer.<sup>6</sup> The modern rule of courts following the principles of the common law is, that the defendant may claim for his sworn answer a credit equal to that of any one witness, in all cases where his answer is "positively, clearly, and precisely" responsive to any matter stated in the bill, as to which he is called upon to answer; for by so calling upon him the complainant is held to admit the answer to be evidence.<sup>7</sup> But the evidence of an additional witness, or even the evidence of circumstances alone,

<sup>1</sup> *Supra*, § 192.

<sup>4</sup> *Smith v. State*, 23 Ga. 297.

<sup>2</sup> *Turner v. Foxall*, 2 Cranch, C. C. 324. S. P., in later cases. *Meixell v. Williamson*, 35 Ill. 529; *Brett v. Catlin*, 47 Barb. (N. Y.) 404.

<sup>5</sup> 1 Greenl. Ev. § 260.

<sup>6</sup> *Hynson v. Texada*, 19 La. Ann. 470.

<sup>3</sup> *Pierce v. State*, 53 Ga. 365; *Day v. Crawford*, 13 Id. 508.

<sup>7</sup> *Gresley*, Ev. p. 4; *Cooth v. Jackson*, 6 Ves. 40.

may be sufficient to turn the scale in favor of the complainant.<sup>1</sup>

§ 221. **Competency of Corroborating Evidence.**—In general, a corroboration, to be of any avail, should be as to some matter material to the issue.<sup>2</sup> Thus, where a witness has been shown to be infamous, the confirmation of his testimony should be as to such parts of his narrative as may reasonably satisfy the jury of its truth; not restricted to any particular points, or extended to facts generally known.<sup>3</sup> Ordinarily, the truth of a witness' testimony as to one fact or set of facts, cannot be demonstrated by proving the existence of another and distinct fact or set of facts. Thus, the fact that a debtor had the means of paying a debt, is not admissible as evidence tending to corroborate his testimony that he did pay it;<sup>4</sup> and a witness denying that he stated a fact as another witness swears he did, and claiming to have stated a different fact, evidence that the fact existed, which he has testified that he stated, is inadmissible to corroborate him.<sup>5</sup>

But this rule is not an inflexible one; accordingly, where the date of a transaction is in issue, dates of other transactions may be gone into to enable witnesses to fix the date in dispute.<sup>6</sup> So, also, in a real action, a deed for other land than that in controversy may be read in evidence to corroborate statements of witnesses.<sup>7</sup>

<sup>1</sup> *Pember v. Mathers*, 1 Bro. Ch. 52. See also *Abbott v. Case*, 11 C. E. Gr. (N. J.) 187; *Morris v. White*, 9 Stew. (N. J.) 324; *Vigel v. Hopp*, 104 U. S. 441; *Campbell v. Patterson*, 95 Pa. St. 447; *Jones v. Abraham*, 75 Va. 465. In New York the rule no longer obtains. *Stilwell v. Carpenter*, 62 N. Y. 639. See also 3 Greenl. Ev. § 289 and notes, where the conclusiveness of an answer in chancery is further discussed.

<sup>2</sup> *Fraser v. People*, 54 Barb. (N. Y.) 306.

<sup>3</sup> *United States v. Biebusch*, 1 McCrary (U. S.) 42.

<sup>4</sup> *Atwood v. Scott*, 99 Mass. 177.

<sup>5</sup> *Edgerton v. Wolf*, 6 Gray (Mass.) 453.

<sup>6</sup> *Harris v. Rosenberg*, 43 Conn.

227; *Goodhand v. Benton*, 6 Gill & J. (Md.) 481.

<sup>7</sup> *Buie v. Carver*, 75 N. C. 559. See also *Richardson v. Stewart*, 4 Binn. (Pa.) 198; *Boston &c. R. R. v. Dana*, 1 Gray (Mass.) 85.

But a witness testifying to a confession by the accused, cannot be corroborated by proving the commission by the accused of another offence of the same kind as that for which he is on trial. *People v. Schweitzer*, 23 Mich. 301. In *Ashley v. Wolcott* (11 Cush. (Mass.) 192), a witness, testifying to the existence of a certain watercourse, stated that many years previous, as he was putting in a water-wheel, the plaintiff's father struck him, and he still bore the marks on his arm. Being asked by the party

Again, the testimony of a witness who has been contradicted as to an alleged fact cannot be corroborated by showing that he related the same fact in the same way before ;<sup>1</sup> or by a mere cumulation of evidence on an immaterial point to which he has testified.<sup>2</sup>

Where a witness is charged with bias in favor of the party calling him, such party may corroborate the witness by showing that he (the party) and the witness are not on friendly terms.<sup>3</sup> If a witness in a criminal case is cross-examined on the theory that he was in a conspiracy to set the prosecution on foot, he may be sustained by showing that another person, to whom the facts had become professionally known, wrote to the public authorities, and was the cause of the prosecution being instituted.<sup>4</sup> So where the great delay in instituting a criminal prosecution tends to excite suspicion as to the truth of the charge, and to lead to an impression unfavorable to the principal witness, the prosecutor may prove any circumstances calculated to remove such presumption.<sup>5</sup> And in assumpsit for work done, where a witness had testified to statements of the parties that the work could be done for less than the amount claimed, and plaintiff introduced evidence to discredit him, it was proper for the defendant, for the purpose of sustaining his witness, to introduce testimony to show that the work might have been done for the amount named by the witness.<sup>6</sup> So, also, letters from the adverse party, showing his high esteem of the impeached witness, are admissible to sustain him ;<sup>7</sup> and so are letters containing admissions tending to confirm the witness' testimony.<sup>8</sup> The rule is, also, that papers not evidence *per se*, but proved to have been true statements of facts at the time they were made, are admissible in connection with the testimony of the witness who made them.<sup>9</sup> Thus, letters written by a witness

calling him to show the marks to the jury, the court refused to allow it, and this ruling was held correct.

<sup>1</sup> *Hodges v. Bales*, 1 N. East. Rep. 692. See also *Second Ward Bank v. Shakman*, 30 Wis. 333.

<sup>2</sup> *McClintock v. Whittemore*, 16 N. H. 268 ; *Wiggin v. Plumer*, 31 N. H. 251.

<sup>3</sup> *Clapp v. Wilson*, 5 Den. (N. Y.) 285.

<sup>4</sup> *Lohman v. People*, 1 N. Y. (1 Comst.) 379.

<sup>5</sup> *People v. Lohman*, 2 Barb. (N. Y.) 216.

<sup>6</sup> *Clapp v. Wilson*, 5 Den. (N. Y.) 285.

<sup>7</sup> *Stacy v. Graham*, 14 N. Y. 492.

<sup>8</sup> *Soules v. Burton*, 36 Vt. 652.

<sup>9</sup> *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375.

are admissible as auxiliary to his testimony, and as memoranda made by him, if he testifies that though he had forgotten the facts therein stated, the statements were undoubtedly true at the time they were written.<sup>1</sup>

§ 222. **Its Sufficiency and Effect.** — The sufficiency of the confirmatory proof must depend in a great measure upon the facts and circumstances of each particular case, and is, in all cases, peculiarly a question for the jury, and for them only to pass upon. Much depends on the nature as well as the extent of the corroboration. Credit is restored to a much greater extent when the witness is corroborated as to the main fact than when corroboration is confined to immaterial facts.<sup>2</sup> Still corroboration is necessary as to those points of the case which are relied upon, and it is not sufficient that it goes, generally, to the main question at issue.<sup>3</sup>

§ 223. **Sustaining a Witness by Proof of Character.** — Where the general character of a witness, or his reputation for truth and veracity, is impeached, the party calling him may call other witnesses who know him to prove that his reputation is good,<sup>4</sup> and that he is entitled to full credit on his oath.<sup>5</sup> So, also, on a criminal trial, if the character of a state's witness is impeached, the state may show that the facts to which he testified are true.<sup>6</sup> If the accused offer evidence that a state's witness was suborned, and paid for his testimony, the state may show, in rebuttal, the good character of the witness for truth and veracity. Even an unsuccessful attempt to impeach the character of a witness warrants the introduction of evidence in support of his character.<sup>7</sup> Where

<sup>1</sup> *Lewis v. Ingersoll*, 3 Abb. (N. Y.) App. Dec. 55; *Driggs v. Smith*, 45 How. (N. Y.) Pr. 447. Otherwise where the witness testifies clearly and distinctly to the facts contained in the letters. *Driggs v. Smith*, 45 How. (N. Y.) Pr. 447. In *Fain v. Edwards* (Busb. (N. C.) L. 64) testimony by a witness that plaintiff had agreed to give him credit for thirty dollars was impeached, and the books of the plaintiff showing that such credit was actually given him were admitted to corroborate the witness.

<sup>2</sup> *Haynes v. State*, 17 Ga. 465.

<sup>3</sup> *Troxdale v. State*, 9 Humph. (Tenn.) 411.

<sup>4</sup> *Clackner v. State*, 33 Ind. 412;

*State v. Nelson*, 58 Iowa, 208; *Prentiss v. Roberts*, 49 Me. 127; *Sloan v. Edwards*, 61 Md. 89; *Hamilton v. People*, 29 Mich. 173, 184; *People v. Rector*, 19 Wend. (N. Y.) 569; *Stape v. People*, 85 N. Y. 390; *George v. Pilcher*, 28 Gratt. (Va.) 299.

<sup>5</sup> *M'Cutchen v. M'Cutchen*, 9 Port. (Ala.) 650, and many of the cases cited *supra*.

<sup>6</sup> *John v. State*, 16 Ga. 200. *Contra*, *State v. Parish*, 22 Iowa, 284.

<sup>7</sup> *Com. v. Ingraham*, 7 Gray (Mass.) 46, where the impeaching witness, being asked what was the character of another witness, unexpectedly answered that it was good.

the character of an attesting witness to a deed or will is attacked by another who survives him, the character of the deceased witness may be supported in like manner.<sup>1</sup>

This method of sustaining a witness may properly be resorted to where the impeachment consists in the proof of a charge of crime or moral turpitude, previously made against the witness,<sup>2</sup> or his conviction of crime.<sup>3</sup>

Where the witness is impeached by proof of contradictory or inconsistent statements shown to have been made by him out of court,<sup>4</sup> the authorities are divided upon the propriety of admitting proof of good character for truth and veracity to sustain him. Some courts consider such an impeachment an attack upon the witness' general character for truth and veracity, and permit him to be corroborated in this manner,<sup>5</sup> while others of equal respectability decline to admit evidence of character in such cases.<sup>6</sup>

But until the character of a witness has been attacked or impeached by the opposite party, his good character cannot be shown for the purpose of supporting him,—upon this point the decisions are, for the most part, in harmony,<sup>7</sup>—

<sup>1</sup> Doe *d.* Walker *v.* Stevenson, 3 Esp. 284; Doe *d.* Stevenson *v.* Walker, 4 Esp. 50; Provis *v.* Reed, 5 Bing. 435; Black *v.* Ellis, Riley (S. C.) 73.

<sup>2</sup> Webb *v.* State, 29 Ohio St. 351; Tedens *v.* Schumers, 14 Ill. App. 607; Mosley *v.* Vermont &c. Ins. Co., 55 Vt. 142; Carter *v.* People, 2 Hill (N. Y.) 317. But it seems that an admission by a witness on his cross-examination that he had been prosecuted, but not tried, for perjury, does not authorize the party calling him, to give evidence of his general good character. People *v.* Gay, 1 Park. (N. Y.) Cr. 308; 7 N. Y. 378. S. P., Harrington *v.* Lincoln, 4 Gray (Mass.) 563; Hannah *v.* McKellip, 49 Barb. (N. Y.) 342. These decisions seem to go upon the ground that good character cannot rebut proof of particular facts against the witness elicited from his own statements.

<sup>3</sup> People *v.* Amaracus, 50 Cal. 233; Gertz *v.* Fitchburg R. R. Co., 137 Mass. 77; s. c., 19 Cent. L. J. 134; Webb *v.* State, 29 Ohio St. 351.

<sup>4</sup> See *supra*, § 203 *et seq.*

<sup>5</sup> Hadjo *v.* Gooden, 13 Ala. 718; Lewis *v.* State, 35 Ala. 380; Haley *v.* State, 63 Ala. 83; Clark *v.* Bond, 29 Ind. 555; Harris *v.* State, 30 Ind. 131; Stratton *v.* State, 45 Ind. 468; Isler *v.* Dewey, 71 N. C. 14; Glaze *v.* Whitley, 5 Oreg. 164; Burrell *v.* State, 18 Tex. 713; Paine *v.* Tilden, 20 Vt. 554; Sweet *v.* Sherman, Id. 23.

<sup>6</sup> Stamper *v.* Griffin, 12 Ga. 450; Vance *v.* Vance, 2 Metc. (Ky.) 581; Russell *v.* Coffin, 8 Pick. (Mass.) 143; Brown *v.* Mooers, 6 Gray (Mass.) 451; Frost *v.* McCargar, 29 Barb. (N. Y.) 617; Webb *v.* State, 29 Ohio St. 351; Wertz *v.* May, 21 Pa. St. 274; Chapman *v.* Cooley, 12 Rich. (S. C.) 654. See also Paxton *v.* Dye, 26 Ind. 393.

<sup>7</sup> Rogers *v.* Moore, 10 Conn. 13; Johnson *v.* State, 21 Ind. 329; Brann *v.* Campbell, 86 Ind. 516; State *v.* Cooper, 71 Mo. 436; Starks *v.* People, 5 Den. (N. Y.) 106; Braddee *v.* Brownfield, 9 Watts (Pa.) 124; Wertz *v.* May, 21 Pa. St. 274. But see to the contrary, Newton *v.* Jackson, 23 Ala.

and the fact that the testimony of other witnesses contradicts his own does not constitute such an attack or impeachment of the witness as to render such proof admissible,<sup>1</sup> even though his accuracy as to some particular facts has been discredited;<sup>2</sup> otherwise, it seems, where the contradiction is on a material point, and is such as to fairly put the credit of the witness in issue.<sup>3</sup>

The number of witnesses who may be called to sustain the character of an impeached witness is a matter resting in the sound discretion of the court.<sup>4</sup> Ordinarily they must swear that they know his general character for truth and veracity, or they cannot be heard;<sup>5</sup> but if they claim to have known the impeached witness personally for a considerable period of time, negative testimony that they never heard anything said about his character for truth, is competent to show good reputation.<sup>6</sup> If the sustaining witness says he has heard the character of the impeached witness spoken against, the party calling him may ask him who he heard so speak,<sup>7</sup> or whether the unfavorable remarks were in relation to particular traits, such as drinking and horse-trading.<sup>8</sup>

§ 224. **Showing Previous Consistent Statements.**—Whether, after the impeachment of a witness by proof that, prior to the time of giving his testimony-in-chief, he made statements out of court inconsistent with or contradictory to that testimony, the party calling him may produce other witnesses to prove that he affirmed the same thing before the trial which he has testified to, *i.e.*, that, instead of having involved himself in

335; *Merriam v. Hartford &c. R. R. Co.*, 20 Conn. 354.

<sup>1</sup> *Owens v. White*, 28 Ala. 413; *State v. Ward*, 49 Conn. 429; *Pruitt v. Cox*, 21 Ind. 15; *Brown v. Campbell*, 86 Ind. 516; *Heywood v. Reed*, 4 Gray (Mass.) 574; *Starks v. People*, 5 Den. (N. Y.) 106.

<sup>2</sup> *Leonori v. Bishop*, 4 Duer (N. Y.) 420.

<sup>3</sup> *Davis v. State*, 38 Md. 15, 50. In this case both the contradictory witnesses were supported by proof of good character. See also *George v. Pilcher*, 28 Gratt. (Va.) 299.

<sup>4</sup> *Bunnell v. Butler*, 23 Conn. 65; *Cox v. Pruitt*, 25 Ind. 90; *Bissell v. Cornell*, 24 Wend. (N. Y.) 354.

<sup>5</sup> *Cook v. Hunt*, 24 Ill. 535; *Lyman v. Philadelphia*, 56 Pa. St. 488. *Contra*, if they swear they intimately know the impeached witness himself, and would believe him under oath, although they disclaim knowledge of his reputation for truth. *Taylor v. Smith*, 16 Ga. 7; *People v. Davis*, 21 Wend. (N. Y.) 309. See also *Artope v. Goodall*, 53 Ga. 318.

<sup>6</sup> *State v. Nelson*, 58 Iowa, 208; *State v. Lee*, 22 Minn. 407; *Morss v. Palmer*, 15 Pa. St. 51; *Davis v. Franke*, 33 Gratt. (Va.) 413.

<sup>7</sup> *Bakeman v. Rose*, 18 Wend. (N. Y.) 146.

<sup>8</sup> *Stape v. People*, 85 N. Y. 390; *reversing s. c.*, 21 Hun, 399.

contradiction, he is consistent with himself, is another topic, upon which codification would settle much contradiction in case-law. Chief Baron Gilbert took the affirmative view,<sup>1</sup> while Buller, J., held that such evidence is clearly inadmissible in chief, and of doubtful admissibility in reply.<sup>2</sup>

Argument would seem to be unnecessary to sustain the proposition that an unsworn statement is without value as confirmation of a sworn one. Confirmation should take the reverse course, *i.e.*, the unsworn should be confirmed by the sworn statement.<sup>3</sup> In America, the weight of authority rejects the general proposition that proof of former consistent statements is admissible, in such cases, to support the wit-

<sup>1</sup> Gib. Ev. 135; Hawk. P. C. b. 2, c. 46, § 48. And see *Lutterel v. Reynell*, 1 Mod. 282; and Sir J. Friend's Case, 13 How. St. Tr. 32. See also *Harrison's Case*, 12 Id. 861, in which case this confirmatory evidence was offered *in chief*,—which would not now be allowed. *Smith v. Stickney*, 17 Barb. 489.

<sup>2</sup> B. N. P. 294. And see *R. v. Parker*, 3 Doug. 242, 244, where Buller, J., says: "It is now settled that what a witness said not upon oath would not be admitted to confirm what he said upon oath." See also *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *March v. Harrall*, 1 Jones (N. C.) L. 329; *Robb v. Hackley*, 23 Wend. (N. Y.) 50. In the *Berkeley Peerage Case* (Ms. 5th June, 1811) one of the peers inquired of a witness, who had been cross-examined and re-examined, as to statements made by Lady Berkeley on a former occasion, respecting her supposed marriage. The Solicitor-General suggested to the committee, whether this was the regular course of proceeding, and stated what he conceived to be the general rule upon the subject. The admissibility of the former statements was then much discussed. After the arguments of counsel on both sides, Lord Redesdale said he had always understood that, for the purpose of impugning the testimony of a witness, his declaration at another time might be inquired into, but not for the purpose of confirming his evi-

dence. And the Lord Chancellor expressed his decided opinion that this was the true rule to be observed by the counsel in the cause; but considering the house as, in some degree, standing both in the situation of the counsel for the claimant and of the counsel against the claimant, he was of opinion that the question might be properly asked by the house, though it could not be asked by the counsel on one side; but with respect to the answer to the question, it might be the question of future consideration, whether it ought to stand upon the minutes as evidence. The question respecting the former representations of Lady Berkeley was, therefore, repeated by one of the Lords, and the answer entered among the minutes, subject to future revision.

<sup>3</sup> It is the oath that confirms, and the bare assertion that requires confirmation. The probability is, that in almost every case the witness who swears to certain facts at the trial has been heard to assert the same facts before the trial; and it is not so much in support of his character, that he has given at other times the same account, as it would be to his discredit, that he should ever have made one different. The imputation on his veracity results from the fact of his having contradicted himself, and this is not in the least controverted or explained by the evidence in question. 2 Phil. Ev. \*974.

ness,<sup>1</sup> except where his testimony is charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, *i.e.*, where the counsel on the other side impute to the witness a design to misrepresent from some motive of interest or relationship—in which case, in order to repel such an imputation, it is proper to show that the witness made a similar statement at a time when the supposed motive did not exist, and the effect of such statement could not be foreseen, or when motives of interest would have prompted him to make a different statement of the facts.<sup>2</sup> Still, there are numerous apparently well-considered cases in this country which hold that evidence of prior consistent statements of a witness are competent after, but not before, an attempt to impeach him.<sup>3</sup>

But in no event, except in prosecutions for rape or seduction, can a witness be allowed, for the purpose of strengthening his testimony, to state, on his examination-in-chief, that he had previously communicated to others the same facts to which he has testified, or other particular facts.<sup>4</sup>

<sup>1</sup> *Conrad v. Griffey*, 11 How. (U. S.) 480; *United States v. Holmes*, 1 Cliff. (U. S.) 98; *Smith v. Morgan*, 38 Me. 468; *Rincy v. Vanlandingham*, 9 Mo. 816; *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Dudley v. Bolles*, 24 Id. 465; *Nichols v. Stewart*, 20 Ala. 358; *People v. Finnegan*, 1 Park. (N. Y.) Cr. 147; *Munson v. Hastings*, 12 Vt. 348; *Butler v. Trusloe*, 55 Barb. (N. Y.) 293; *Dufresne v. Weise*, 46 Wis. 290; *Smith v. Morgan*, 38 Me. 468; *Ellicott v. Pearl*, 1 McLean (U. S.) 206; *State v. Vincent*, 24 Iowa, 570; *Ware v. Ware*, 8 Me. 42; *Commonwealth v. Jenkins*, 10 Gray (Mass.) 485; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123; *Powers v. Cary*, 64 Me. 10; *Reed v. Spaulding*, 42 N. H. 114.

<sup>2</sup> *People v. Doyll*, 48 Cal. 85; *French v. Merrill*, 6 N. H. 465; *Reed v. Spaulding*, 42 N. H. 114; *State v. Thomas*, 3 Strobh. (S. C.) 269; *Com. v. Jenkins*, 10 Gray (Mass.) 485; *State v. Hendricks*, 32 Kan. 559; *Herrick v. Smith*, 13 Hun (N. Y.) 446; *Hester v. Com.*, 85 Pa. St. 139; *Stolp v. Blair*, 68 Ill. 541; *Stewart v. People*, 23

Mich. 63; *Hotchkiss v. Germania Ins. Co.*, 5 Hun (N. Y.) 91; *Hayes v. Cheatham*, 6 Lea (Tenn.) 1.

<sup>3</sup> *State v. Grant*, 79 Mo. 113; *United States v. Neousen*, 1 Mack. (U. S.) 152; *The Pacific*, Newb. Adm. 8; *Haley v. State*, 63 Ala. 83; *Henderson v. State*, 70 Ala. 29; *Perkins v. State*, 4 Ind. 222; *Brookbank v. State*, 55 Ind. 169; *Dodd v. Moore*, 92 Ind. 397; *State v. Petty*, 21 Kan. 54; *Cooke v. Curtis*, 6 Har. & J. (Md.) 93; *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *People v. Recter*, 19 Wend. (N. Y.) 569; *Henderson v. Jones*, 10 S. & R. (Pa.) 322; *Bailey v. State*, 9 Tex. App. 98; *State v. Dennin*, 32 Vt. 158; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Beauchamp v. State*, 6 Id. 300; *Dailey v. State*, 28 Ind. 285; *Johnson v. Patterson*, 2 Hawks (N. C.) 183; *March v. Harrell*, 1 Jones (N. C.) L. 329; *Lyles v. Lyles*, 1 Hill (S. C.) Ch. 76; *Dossett v. Miller*, 3 Sneed (Tenn.) 72. Compare *Robertson v. Caw*, 3 Barb. (N. Y.) 410; *Turney v. State*, 9 Tex. App. 192; *Holbert v. State*, Id. 219.

<sup>4</sup> *Deshon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 199.



Thus, on a trial for larceny, the account of the offence given by the prosecuting witness cannot be confirmed by proof that, immediately after its alleged occurrence, he reported the circumstances to other persons.<sup>1</sup>

. Stated in other words, the rule is, that a party cannot support his positive testimony of facts stated upon his own knowledge, by testifying, himself, to other consistent or corroborative facts that are immaterial in themselves, and which, like the facts sought to be corroborated, must rest entirely upon his own oath.<sup>2</sup>

But it has been held that, in defining the terms of a written contract, a witness may state, as one of the reasons why he is confident that his recollection is correct, that he stated the terms of the contract in the same way, to a third person, shortly after the transaction ;<sup>3</sup> and that where a witness has expressed an admissible opinion, he may state in corroboration that he previously gave the same opinion to another ; especially where it is elicited on cross-examination.<sup>4</sup>

§ 225. **Corroboration of Prosecuting Witnesses in Certain Cases.**—(1) *Adultery and Seduction.* In prosecutions or civil actions based upon either of these wrongs or crimes, where the defendant has endeavored to impeach the character of the wife or daughter, by general evidence, upon cross-examination, or by calling witnesses, general evidence of good character is admissible in reply.<sup>5</sup> Even where the female involved is not in any way impeached, her evidence must generally be corroborated to sustain the prosecution,<sup>6</sup> and if insufficiently confirmed, a conviction will be set aside.<sup>7</sup> So, also, the very nature of such a prosecution or civil action

<sup>1</sup> Haynes v. Commonwealth, 28 Gratt. (Va.) 942. For exceptions to this rule, see *infra*, § 225.

<sup>2</sup> Anderson v. Russell, 34 Mich. 109.

<sup>3</sup> Scruggs v. Gibson, 40 Ga. 511.

<sup>4</sup> Godfrey v. Mayberry, 84 N. C. 255.

<sup>5</sup> Banfield v. Massey, 1 Campb. 460; Dodd v. Norris, 3 Id. 519. But only when her character is attacked. Pratt v. Andrews, 4 N. Y. 493. And see King v. Francis, 3 Esp. 116.

<sup>6</sup> Merritt v. State, 10 Tex. App. 402; s. c., 12 Id. 203; Armstrong v. People, 70 N. Y. 38.

<sup>7</sup> Merritt v. State, *supra*. The statute does not require direct and positive corroborative evidence, but simply such facts and circumstances as fairly tend to support the evidence of the prosecutrix and shall satisfy the jury that she is entitled to credit. When there is some other evidence fairly tending to support her testimony upon all the facts essential to constitute the offence, it is for the jury to say whether she is sufficiently corroborated to warrant a conviction. State v. Brinkhaus, 25 N. W. Rep. 642.

being an attack upon the moral character of the defendant, he may give evidence in support of his good character by way of defence, even where he has not been impeached.<sup>1</sup> Whether the plaintiff can rebut the proof of particular instances of misconduct on the part of the wife or daughter, by proof of general good character, is doubtful, and the weight of authority seems to forbid such proof.<sup>2</sup>

(2) *Bastardy*. In England, no order against the putative father can be made, unless the evidence of the mother be corroborated in some material particular,<sup>3</sup> but in this country the common-law rule is still in force in most jurisdictions, and no corroboration is required;<sup>4</sup> the proceeding not being considered a criminal one, only a preponderance of evidence is deemed necessary.<sup>5</sup> But where the relatrix is impeached, *e.g.*, by proof that she has made statements in reference to the paternity of the child inconsistent with her testimony upon the stand, witnesses may be called to sustain her general good character for truth;<sup>6</sup> and in such cases the corroboration required is not such as must be competent to sustain the charge without and independent of her evidence.<sup>7</sup> But no corroboration should be allowed until some sort of attack has been made upon the credit of the witness.<sup>8</sup>

(3) *Breach of promise*. The same rules apply here — corroboration is admissible after but not before impeachment, but not absolutely essential to a recovery. The jury are the exclusive judges of complainant's credibility.<sup>9</sup> Thus if defendant attempts to prove improper and lewd conduct on the

<sup>1</sup> *Cox v. Pruitt*, 25 Ind. 90.

<sup>2</sup> See cases already cited; also *Farr v. Hicks*, Bull, N. P. 296; s. c., 4 Esp. 51; *Bate v. Hill*, 1 Car. & P. 100; *Shattuck v. Hammond*, 46 Vt. 466; *Smith v. Masters*, 15 Wend. (N. Y.) 270. See also *Com. v. Gray*, 129 Mass. 474, where the defendant was allowed to show the character of the female for chastity to be good, as a part of his defence; and *R. v. Clarke*, 2 Stark, 242, where general evidence of character was received after the prosecutrix's character had been impeached upon her cross-examination.

<sup>3</sup> 8 & 9 Vict. c. 10, § 6; 35 & 36 Vict. c. 6, § 4.

<sup>4</sup> *State v. Nichols*, 29 Minn. 357; *State v. McGlothlen*, 56 Iowa, 545.

<sup>5</sup> *State v. Nichols*, *supra*; *State v. Romaine*, 3 Iowa Transc. No. 1, p. 46; *Semon v. People*, 42 Mich. 141; *State v. Sullivan*, 12 R. I. 212.

<sup>6</sup> *Sweet v. Sherman*, 21 Vt. 23. See also *Judson v. Blanchard*, 4 Conn. 557.

<sup>7</sup> *McClellan v. State* (Wis.) 28 N.W. Rep. 347.

<sup>8</sup> *People v. White*, 19 N. W. Rep. (Mich.) 174.

<sup>9</sup> See, generally, *Howman v. Earle*, 53 N. Y. 267; *Wightman v. Coates*, 15 Mass. 1.

part of the plaintiff, after the promise, she may undoubtedly vindicate her character if she can.<sup>1</sup>

(4) *Divorce*. In divorce cases, it is a general rule in most jurisdictions not to grant a decree on the uncorroborated testimony of the complainant,<sup>2</sup> or even on the confession of the defendant, standing alone.<sup>3</sup> In some States neither party to the suit *can testify* to the fact of adultery, when that is the ground of divorce, but the rule is otherwise when the suit is based on some other ground, such as cruelty, desertion, etc.<sup>4</sup>

Where a paramour or spy is a witness, corroboration is necessary, as the witness is often looked upon in the light of an accomplice,<sup>5</sup> but, even an alleged paramour who appears as a witness in obedience to process, and denies any criminality, need not be corroborated.<sup>6</sup>

(5) *Perjury*. Formerly, at least two witnesses were required to testify to the commission of perjury in order to sustain a conviction; for otherwise there would be no more than the oath of one man against that of another.<sup>7</sup> The modern rule is that the evidence must more than counterbalance the oath of the defendant and the presumption of innocence.<sup>8</sup> If only one witness proves the crime, therefore, he must be corroborated by circumstances, sufficient to destroy the balance between his own and the defendant's oath.<sup>9</sup> Documentary and circumstantial evidence, without the production of any living witness, may be sufficient to convict.<sup>10</sup>

<sup>1</sup> See *Kniffin v. McConnell*, 30 N. Y. 285; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Wells v. Padgett*, 8 Barb. (N. Y.) 323.

<sup>2</sup> *Robbins v. Robbins*, 100 Mass. 150; *Tate v. Tate*, 11 C. E. Gr. (N. J.) 55. But see to the contrary, *Flattery v. Flattery*, 88 Pa. St. 27.

<sup>3</sup> *Lyon v. Lyon*, 62 Barb. (N. Y.) 138; *Summerbell v. Summerbell*, 10 Stew. (N. J.) 603; *Evans v. Evans*, 41 Cal. 103.

<sup>4</sup> As to the competency of the parties in these cases, see *supra*, § 168. See also, as to corroboration of the complainant's testimony as to cruelty, *Berdell v. Berdell*, 80 Ill. 604.

<sup>5</sup> See *infra*, Chap. XVI.

<sup>6</sup> *Pollock v. Pollock*, 71 N. Y. 137.

<sup>7</sup> 1 Stark. Ev. 443; 4 Bl. Com. 358; 2 Russ. Cr. 1791.

<sup>8</sup> 1 Greenl. Ev. §§ 257-259 and authorities cited.

<sup>9</sup> As to the sufficiency of the corroborative evidence, see *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118, 121. See also *Reg. v. Braithewaite*, 8 Cox, C. C. 254; *Reg. v. Boulter*, 16 Jur. 135; *State v. Buie*, 43 Tex. 532; *Com. v. Pollard*, 12 Metc. (Mass.) 225; *Venable's Case*, 24 Gratt. (Va.) 639; *Russ. Cr.* 77-86; *Williams v. Com.*, 91 Pa. St. 493; *People v. Stone*, 32 Hun (N. Y.) 41; *State v. Heed*, 57 Mo. 252; *Com. v. Parker*, 2 Cush. (Mass.) 212.

<sup>10</sup> *United States v. Wood*, 14 Pet. (U. S.) 430, reviewing the early decisions.

(6) *Rape*. The rule in these cases is that evidence may be given that the prosecutrix made *a complaint* of the assault to some one, but not *what complaint*;<sup>1</sup> but, if she be impeached on this point (and the particulars of the complaint may lawfully be elicited on the cross-examination), the facts she stated when she made her complaint may be proved by way of confirming her testimony.<sup>2</sup> So, also, she may be corroborated, as in other cases, where her character for chastity is impeached.

(7) *Treason*. The Constitution of the United States provides, that "no person shall be convicted of treason unless on the testimony of two witnesses to the *same overt act*, or on confession in open court."<sup>3</sup> Under the English statute,<sup>4</sup> where there were two or more overt acts alleged, one witness to each was deemed enough, two witnesses *in all* being sufficient to support a conviction.<sup>5</sup> Where the prisoner's confession was introduced to confirm the testimony of the witnesses, the confession could be proved by one credible witness,<sup>6</sup> as indeed could the offence itself, at common law.<sup>7</sup>

<sup>1</sup> Reg. v. Walker, 2 Moo. & Rob. 212; Reg. v. Megson, 9 Car. & P. 420; State v. Niles, 47 Vt. 82; Baccio v. People, 41 N. Y. 265; Higgins v. People, 58 Id. 377; State v. Ivins, 7 Vr. (N. J.) 233; State v. Richards, 33 Iowa, 420. In some few jurisdictions the particulars of the complaint are admitted. State v. Kinney, 44 Conn. 153; Burt v. State, 23 Ohio St. 394. See also 14 Amer. Law Review, 832.

<sup>2</sup> Thompson v. State, 38 Ind. 39. The statements of the female, made *immediately after the transaction*, may be proved to corroborate her testimony. Laughlin v. State, 18 Ohio, 99.

In State v. Laxton (78 N. C. 564), where the testimony of the prosecutrix was impeached by proof of inconsistent statements made by her on the preliminary trial before a justice of

the peace, it was held competent for the prosecution, in corroboration, to prove her declarations on the day following the commission of the crime. S. P., Pleasant v. State, 15 Ark. 624.

<sup>3</sup> Art. 3, § 3. Similar provisions are to be found in the constitutions of many of the States.

<sup>4</sup> 7 Wm. III. c. 3, § 2.

<sup>5</sup> The New York statute is virtually the same as the English act. 2 Rev. Stat. 735, § 16.

<sup>6</sup> R. v. Willis, 15 How. St. Tr. 622, 624, 643; Fost. Disc. 241. See also R. v. Crossfield, 26 How. St. Tr. 56, 57; Republica v. Roberts, 1 Dall. (U. S.) 39; Republica v. McCarty, 2 Id. 86; Burr's Trial, 196.

<sup>7</sup> Fost. Disc. 233; Woodbeck v. Keller, 6 Cow. (N. Y.) 120; McNall. Ev. 31.

## CHAPTER XVI.

### CORROBORATION OF ACCOMPLICES.

§ 226. The Necessity of Corroboration.

§ 227. Its Sufficiency.

§ 228. Who are deemed Accomplices within the Rule.

§ 226. **The Necessity of Corroboration.**—Accomplices being competent witnesses, as we have already seen,<sup>1</sup> it would seem to follow, necessarily, that in case the jury credit their testimony, a conviction may be legally founded upon it, though it is not corroborated or confirmed by other evidence; for it is as much the province of the jury to determine upon the degree of credit to be given to the testimony of an accomplice, as to that of any other witness. And it may be said, that at common law, as laid down by numerous decisions, a conviction obtained upon the unsupported testimony of an accomplice is strictly legal.<sup>2</sup> And such is the rule in many of the States,<sup>3</sup> while in others (by statutory enactment) corroboration of the accomplice witness is a necessary prerequisite to conviction.<sup>4</sup>

<sup>1</sup> *Supra*, §§ 21, 42, 43.

<sup>2</sup> *R. v. Atwood*, Leach, C. C. 521; *R. v. Durham*, Id. 538; 1 Hale, P. C. 303; *R. v. Dawber*, 3 Stark. 34; *R. v. Jarvis*, 2 Moo. & R. 40; *R. v. Hastings*, 7 Car. & P. 152; *R. v. Jones*, 2 Campb. 132; s. c., 31 How. St. Tr. 325; *R. v. Barnard*, 1 Car. & P. 87. See *supra*, p. 312, note 3.

<sup>3</sup> *United States v. Neverson*, 1 Mack. (D. C.) 152; *United States v. Bicksler*, Id. 341; *State v. Stebbins*, 29 Conn. 463; *State v. Williamson*, 42 Id. 261; *United States v. Flemming*, 18 Fed. Rep. (Ill.) 907; *Collins v. People*, 98 Ill. 584; s. c., 38 Am. Rep. 105; *Johnson v. State*, 65 Ind. 269; *Ayers v. State*, 88 Ind. 275; *Com. v. Holmes*, 127 Mass. 424; *State v. Watson*, 31 Mo. 361; *Olive v. State*, 11 Neb. 1; *Territory of New Mexico v. Kinney*, 1 West Coast Rep. 801;

*Stape v. People*, 21 Hun (N. Y.) 399 (*contra*, under N. Y. Code, § 399, see *infra*); *State v. Holland*, 83 N. C. 624; s. c., 35 Am. Rep. 587.

<sup>4</sup> *Marler v. State*, 67 Ala. 55; *Lumpkin v. State*, 68 Ala. 56; *People v. Ames*, 39 Cal. 403; *People v. Melvane*, Id. 614; *People v. Cloonan*, 50 Cal. 449; *Johnson v. State*, 4 Greene (Iowa) 65; *Upton v. State*, 5 Iowa, 465; *Bowling v. Commonwealth*, 79 Ky. 604; *Craft v. Commonwealth*, 80 Ky. 349; *People v. Courtney*, 28 Hun (N. Y.) 589; *People v. Ryland*, Id. 568; *Lopez v. State*, 34 Tex. 133; *Wright v. State*, 43 Id. 170; *Nourse v. State*, 2 Tex. App. 304; *Davis v. State*, Id. 588; *Roach v. State*, 4 Id. 46; *Miller v. State*, Id. 251; *Powell v. State*, 15 Id. 441; *Dunn v. State*, Id. 560; *State v. Howard*, 32 Vt. 380.

But this rule of law, that a conviction may be founded upon the testimony of an avowed accomplice, and upon that alone—even in those jurisdictions where it obtains,—has been greatly modified in practice; and it has long been considered, as a general rule of practice, that the testimony of an accomplice ought to receive confirmation; and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge may, in his discretion, advise the jury not to convict the prisoner upon it. It is considered that he *ought* to do so.<sup>1</sup> And, as the jury will rarely disregard this advice from the bench, such convictions are extremely rare, and the substantial result is nearly the same as if the practice depended upon a rule of law, instead of being only the exercise of the discretion of the trial judge. If the judge refuses to give this advice, and a conviction results—or if the jury convict the prisoner contrary to the advice of the judge—in either case, the conviction will stand.<sup>2</sup> There are some adjudications which hold that the rule requiring confirmation does not extend to cases of misdemeanors;<sup>3</sup> but such a distinction, for which there appears to be no sound reason, is not recognized in others.<sup>4</sup> The rule, however, does not extend to civil cases, where an accomplice in a crime is a witness.<sup>5</sup>

§ 227. *Its Sufficiency.*—Considerable difference of opinion is apparent, upon a review of the adjudications, as to the nature and extent of the corroboration necessary to authorize a conviction upon accomplice testimony. Some learned jurists have considered the confirmation of the witness' testimony upon any material part of the case, sufficient; on the theory that, if it be proven that he speaks the truth in one material

<sup>1</sup> Rosc. Cr. Ev. 120; *R. v. Barnard*, 1 Car. & P. 87; *R. v. Stubbs*, 7 Cox, C. C. 48; *United States v. Neverson*, 1 Mack. (D. C.) 152; *United States v. Bicksler*, Id. 341; *State v. Lower*, 1 Houst. (Del.) Cr. 324; *Collins v. People*, 98 Ill. 584; s. c., 38 Am. Rep. 105; *Ray v. State*, 1 Greene (Iowa) 316; *Commonwealth v. Brooks*, 9 Gray (Mass.) 299; *Olive v. State*, 11 Neb. 1; *Ingalls v. State*, 48 Wis. 647.

<sup>2</sup> *R. v. Stubbs*, 7 Cox, C. C. 48; *State v. Litchfield*, 58 Me. 267; *Car-*

*roll v. Com.*, 84 Pa. St. 107. But see *Ray v. State*, 1 Greene (Iowa) 316.

<sup>3</sup> *R. v. Jones*, 31 How. St. Tr. 315; *Truss v. State*, 13 Lea (Tenn.) 311; *Askea v. State*, Ga. Sup. Ct. Oct. 14, 1885; *United States v. Harris*, 2 Bond (U. S.) 311.

<sup>4</sup> *State v. Davis*, 38 Ark. 581. See also *United States v. Smith*, 2 Bond (U. S.) 323; *United States v. One Distillery*, Id. 399; *Parsons v. State*, 43 Ga. 197.

<sup>5</sup> *Kalikoff v. Zoehrlaut*, 43 Wis. 373.

part of his testimony, the jury are authorized to believe other parts of his story, though unconfirmed;<sup>1</sup> collateral facts, however, and irrelevant and immaterial matters cannot be proven to support the witness.<sup>2</sup> Other courts have considered proof of the *corpus delicti*, alone, sufficient to corroborate the testimony of the accomplice;<sup>3</sup> but the true rule, supported by far the greater weight of judicial opinion, is that the confirmatory evidence must, in some degree at least, tend to connect the prisoner with the commission of the crime charged against him, and show his participation in it, and not merely go to prove the commission, by some one, of the offence in question, or the circumstances attending its commission.<sup>4</sup> Thus, proof of facts merely casting upon the defendant a *grave suspicion* of guilt, are not sufficient for this purpose;<sup>5</sup> but the corroboration may be by circumstantial

<sup>1</sup> *Montgomery v. State*, 40 Ala. 684; *State v. Schlagel*, 19 Iowa, 169; *Upton v. State*, 5 Iowa, 465; *State v. Hennessy*, 55 Iowa, 299; *Territory v. Corbett*, 3 Mont. 50; *Erb v. Commonwealth*, 98 Pa. St. 338; *State v. Howard*, 32 Vt. 380; *People v. Lee*, 2 Utah, 441. Compare *State v. Allen*, 57 Iowa, 431.

<sup>2</sup> *Marler v. State*, 68 Ala. 580; *State v. Odell*, 8 Oreg. 30; *Com. v. Bosworth*, 22 Pick. (Mass.) 397-400, explained in *Com. v. Holmes*, 127 Mass. 424; *State v. Graff*, 47 Iowa, 384. See *Despard's Case*, 28 How. St. Tr. 488; *Joy on Accomp.* pp. 98, 99; *Harper v. State*, 11 Tex. App. 1.

<sup>3</sup> *R. v. Atwood*, Leach, C. C. 521.

<sup>4</sup> *Marler v. State*, 67 Ala. 55; *People v. Garnett*, 29 Cal. 622; *People v. Ames*, 39 Cal. 403; *People v. Melvane*, Id. 614; *People v. Cloonan*, 50 Cal. 449; *Ray v. State*, 1 Greene (Iowa) 316; *State v. Willis*, 9 Iowa, 582; *State v. McKenzie*, 18 Id. 573; *State v. Thornton*, 26 Iowa, 79; *Com. v. Holmes*, 127 Mass. 424; *Territory of New Mexico v. Kinney*, 1 West Coast Rep. 801; *People v. Courtney*, 28 Hun (N. Y.) 589; *People v. Ryland*, Id. 568; *Watson v. Commonwealth*, 95 Pa. St. 418; *Wright v. State*, 43 Tex. 170; *Nourse v. State*, 2 Tex. App. 304; *Davis v. State*, Id. 588;

*Jones v. State*, 7 Id. 457; *Roach v. State*, 8 Id. 478; *Watson v. State*, 9 Id. 237; *Welden v. State*, 10 Id. 400; *Cohea v. State*, 11 Id. 622.

<sup>5</sup> *McCalla v. State*, 66 Ga. 346. See also *Simms v. State*, 8 Tex. App. 230.

In *State v. Kellerman* (14 Kan. 135), the accused was charged with stealing a horse. The owner testified that it was taken out of his pasture during the night time, and the accomplice testified that an arrangement was made between the defendant and himself for stealing and selling a horse, and in pursuance thereof, on the night that this horse was taken out of the pasture it was brought by defendant to witness and by him taken to a neighboring town and sold, and produced a writing admitted by defendant to have been written and signed by himself, certifying that the witness was duly "authorized to sell" this horse, described in the writing as "my horse." This writing was held sufficient corroborating testimony to sustain a conviction.

In *Com. v. Drake* (124 Mass. 21), defendant being charged with procuring, at her own house, an abortion on S. denied that S. and the accomplice had ever visited the house. Evidence that the latter had always lived in another

evidence, if sufficiently strong and direct, as well as by the testimony of witnesses.<sup>1</sup> In case there are two or more defendants on trial, corroboration of the testimony of the accomplice criminating one of them, will not sustain his testimony against the other defendants, so as to authorize their conviction.<sup>2</sup> So, also, one accomplice cannot confirm the testimony of another, so as to predicate a conviction upon it;<sup>3</sup> but the confession or admission of the principal defendant, connecting himself with the crime, will be sufficient, and no further confirmation of the accomplice will be necessary.<sup>4</sup> In no case need the confirmatory evidence, standing alone, be sufficient in itself to warrant a conviction,<sup>5</sup> or even to make out a *prima facie* case against the prisoner.<sup>6</sup>

§ 228. **Who are deemed Accomplices within the Rule.**—In

town; that at the time alleged S. and the accomplice had been left near the house by a hackman; and that the accomplice's testimony describing its interior was accurate, was held sufficient to corroborate the accomplice.

In another case, it was held that testimony of a witness that he saw defendant at his home, and in the vicinity of the place where the crime was committed, is corroborative of the testimony of an accomplice as to defendant's guilt, when the defence relied on is an *alibi*. *Territory of New Mexico v. Kinney*, 1 West Coast Rep. 801. Compare *State v. Odell*, 8 Oreg. 30.

So, any act or declaration of the accomplice which goes to show that he and the prisoner committed the crime, may be proved to corroborate the accomplice. *State v. Ford*, 3 Strobb. (S. C.) 517 n.

On a trial for bribery, an accomplice testified that he had bribed defendant by giving him a check on a certain bank, payable to cash or bearer, which had afterwards been returned to witness by the bank; and the prosecution was permitted to corroborate the witness by showing by the books of the bank, a credit to defendant for a like amount deposited by check two days after the alleged bribery. *State v. Smalls*, 11 So. Car. 262.

So, in larceny, possession of the stolen goods by defendant, if clearly proved,

will suffice to confirm the testimony of the accomplice that he and the accused stole them. *Jernigan v. State*, 10 Tex. App. 546. See also *Smith v. State*, 59 Ala. 104; *Ford v. State*, 70 Ga. 722.

<sup>1</sup> *State v. Stanley*, 48 Iowa, 221. See also, on the sufficiency of the confirming proof, *Hughes v. State*, 58 Miss. 355; *Wyoming County v. Bardwell*, 84 Pa. St. 104; *Hester v. Commonwealth*, 85 Id. 139; *Kuichelow v. State*, 5 Humph. (Tenn.) 9; *Gillian v. State*, 3 Tex. App. 132.

<sup>2</sup> *R. v. Moores*, 7 Car. & P. 270; *R. v. Wells*, M. & M. 326; *R. v. Wilkes*, 7 Car. & P. 271. But see *contra*, *King v. Jones*, 2 Campb. 132; s. c., 31 How. St. Tr. 325; *R. v. Dawber*, 3 Stark. 34; *Birkett's Case*, Russ. & Ry. C. C. 252; *King v. Hastings*, 7 Car. & P. 152.

<sup>3</sup> *Johnson v. State*, 4 Greene (Iowa) 65; *Gonzales v. State*, 9 Tex. App. 374.

<sup>4</sup> *People v. Cleveland*, 49 Cal. 578; *People v. Zimmerman* (Cal.), 3 West Coast Rep. 59; *Partee v. State*, 67 Ga. 570; *Territory v. Mahaffey*, 3 Mont. 112.

<sup>5</sup> *Lumpkin v. State*, 68 Ala. 56; *Hoyle v. State*, 4 Tex. App. 230.

<sup>6</sup> *State v. Lawlor*, 28 Minn. 216. Compare *Jackson v. State*, 4 Tex. App. 293; *Jones v. State*, Id. 529.



some instances a witness apparently occupying the position of an accomplice of the prisoner on trial, is not in reality implicated as such, either because he is a several offender, such as a principal in the second degree,<sup>1</sup> or because his apparent connection with the crime was for the purpose of detecting the wrong-doer and bringing him to punishment. It is the latter class with which we are now concerned — spies, informers, and detectives, who cannot, as we have already seen,<sup>2</sup> be said to be accomplices, so as to need corroboration.<sup>3</sup>

<sup>1</sup> *R. v. Hargraves*, 5 Car. & P. 170; *People v. Cook*, 5 Park. (N. Y.) 351; *Stone v. State*, 3 Tex. App. 675.

<sup>2</sup> *Supra*, § 189, and cases there cited.

<sup>3</sup> See also *People v. Farrell*, 30 Cal. 316; *Harris v. State*, 7 Lea (Tenn.) 124. It has been held that the purchaser of liquor unlawfully sold (*People v. Smith*, 28 Hun (N. Y.) 626; s. c., 92 N. Y. 665), and the woman on whom an abortion was produced (*Com. v. Boynton*, 116 Mass.

343) are not accomplices; while a woman with whom incest was committed (*Freeman v. State*, 11 Tex. App. 92; s. c., 40 Am. Rep. 787), and the partner of a gamester who advanced him money to bet (*English v. State*, 35 Ala. 428), were held to be accomplices, and corroboration necessary. As to the proof necessary to impart to a witness the character of an accomplice, see *Com. v. Ford*, 111 Mass. 394; *Com. v. Glover*, Id. 395; *Rhodes v. State*, 11 Tex. App. 563.



# PART III.



# EXAMINATION.



## PART III. — EXAMINATION.

### CHAPTER XVII.

#### IN GENERAL.

§ 229. Discretionary Powers of the Court.

§ 230. The Order of Examination.

§ 231. Notice of Intention to examine a Witness.

§ 232. Examination on the *voir dire*.

§ 229. **Discretionary Powers of the Court.** — The whole subject of the *viva voce* examination of witnesses in open court, is confided, of necessity, to a very great extent, to the sound judicial discretion of the judge presiding at the trial; and but few positive and unbending rules have been laid down with regard to it. The controlling object being simply to elicit the truth from the witness, it would seem to the layman's mind a simple matter to formulate rules and regulations to that end, and which could rarely fail to accomplish it; "but the character, intelligence, moral courage, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end."<sup>1</sup> Therefore much is left to the discretion of the judge, the exercise of which discretion is, in general, not the subject of review, even by an appellate court, except where its abuse can be shown to the prejudice of the party complaining. We are speaking now of the control of the court over the *manner* and *extent* of an examination of a witness, not of rulings on the admissibility of testimony. The propriety of the latter is tested by rules of evidence, with which we are not now concerned.<sup>2</sup>

<sup>1</sup> 1 Greenl. Ev. § 431.

<sup>2</sup> The entire head of the examination of witnesses introduces to a set of general rules which have grown out of the practice at *nisi prius*, but

which must necessarily be so often applied or relaxed, according to circumstances apparent to no one except the presiding judge, that a strict uniformity at all times is not to be ex-

§ 230. **The Order of Examination.**—When a witness has been regularly sworn,<sup>1</sup> he is first examined by the party calling him to testify; this is called the direct examination, or examination-in-chief.<sup>2</sup> When the direct examination is finished, the adverse party is at liberty to cross-examine;<sup>3</sup> after which the party calling the witness may re-examine him.<sup>4</sup> This usually closes the examination of the witness, though in many cases, the adverse party is permitted to re-cross-examine at the close of the re-examination; but this is no more than a further cross-examination, permitted either because new matter is brought out in the re-examination, or because the judge, in his discretion, sees proper, under the circumstances, to allow it. The office of the examination-in-chief is to lay before the court and jury the whole of the information of the witness that is relevant and material; that of the cross-examination is to search and sift, to correct, and supply omissions; that of the re-examination, to explain, to rectify, and put in order.<sup>5</sup>

§ 231. **Notice of Intention to Examine a Witness.**—In the New York chancery practice, where a party wished to examine witnesses, he had to furnish a list of them to the examiner in advance of the hearing;<sup>6</sup> and under the former code practice in that State, notice was required of the intended examination of the assignor of a *chose in action*, in certain cases.<sup>7</sup> But in modern practice, a party to a civil action cannot be required to give notice to his adversary of what witnesses he will rely upon at the trial.<sup>8</sup> In criminal cases, however, the rule is that the prosecution must indorse on the indictment or information a list of the witnesses who are to be examined on behalf of the government, but it would seem that the prosecutor need not call all the witnesses whose names ap-

pected, and indeed, in some instances, would prove injurious to the interests of justice. Much, therefore, is confided to the discretion of the judge, which, though it should not be exercised by an arbitrary strictness on the one hand, or arbitrary indulgence and relaxation on the other, should never be withheld from its office in proper cases. 2 Ph. Ev. (Cow. & H. notes) \*878, note 570.

<sup>1</sup> *Infra*, § 235.

<sup>2</sup> See *infra*, Chap. XVIII.

<sup>3</sup> See *infra*, Chap. XIX.

<sup>4</sup> See *infra*, Chap. XX.

<sup>5</sup> 2 Phil. Ev. \*877.

<sup>6</sup> *Powell v. Tuttle*, 10 Paige (N.Y.) 522.

<sup>7</sup> *Vassae v. Livingston*, 13 N. Y. 248; *Bidwell v. Astor Mutual Ins. Co.* 16 Id. 263.

<sup>8</sup> *Thurmon v. Trammell*, 28 Tex. 371.

pear in this list,<sup>1</sup> and that he is not confined to the list, but may call witnesses whose names do not appear in it,<sup>2</sup> if not as witnesses-in-chief, at least in rebuttal.<sup>3</sup>

§ 232. **Examination on the Voir Dire.** — When a witness is produced to be sworn in chief, and an objection to his competency is made by the adverse party, either on the ground of interest, bias, infamy, or any other disqualifying cause, the court will proceed to try his competency, and this is usually done by examining the witness on the *voir dire*, as we have already seen,<sup>4</sup> or, sometimes, by extrinsic evidence upon the question.<sup>5</sup> But the common law grounds of objection to competency have been so far removed by statute, that this subject has become unimportant, and has already been sufficiently discussed in a former part of this work.<sup>6</sup>

<sup>1</sup> *People v. Quick*, 51 Mich. 547; see *Smith v. State*, 4 Greene (Iowa) 189.  
*People v. Walcott*, Id. 612.

<sup>2</sup> *People v. Lopez*, 26 Cal. 112; <sup>3</sup> *State v. Parish*, 22 Iowa, 284.  
*People v. Symonds*, 22 Cal. 348; <sup>4</sup> *Supra*, § 175.  
*People v. Bonney*, 19 Cal. 426. But <sup>5</sup> *Supra*, § 176.

<sup>6</sup> *Supra*, Chap. XI.

## CHAPTER XVIII.

### EXAMINATION-IN-CHIEF, OR DIRECT EXAMINATION.

- § 233. General Rules.
- § 234. Power of Court to control and limit.
- § 235. The Oath or Affirmation.
- § 236. Interpreters.
- § 237. Separate Examination. — Exclusion from Court-room.
- § 238. What Questions are proper.
- § 239. Inquiring as to Intent or Motive.
- § 240. Rule forbidding Leading Questions.
- § 241. What Questions are Leading.
- § 242. When One may lead his Own Witness.
- § 243. Propriety and Sufficiency of Witness' Answers.
- § 244. Objections to questions or answers.

§ 233. **General Rules.** — It is a rule of evidence that the party holding the affirmative, is bound, in the first instance, to exhaust his testimony, either in sustaining his own allegations or answering those of his antagonist. The party examining a witness-in-chief, is bound at his peril to ask all material questions in the first instance; and if he fail to do this, it cannot be done in reply. No new question can be put in reply unconnected with the subject of the cross-examination, and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination-in-chief, the usual course is to suggest the question to the court, which will exercise its discretion in putting it to the witness.<sup>1</sup>

<sup>1</sup> 1 Stark. Ev. 150. In *R. v. Beezley* (4 Car. & P. 218), the prosecutor, by direction of the court, called witnesses, whose names appeared on the back of the indictment, and had them sworn to give the prisoner's counsel a chance of cross-examination, but did examine them in chief. The prisoner's counsel, having accordingly cross-examined, it was held that after this, the counsel for the crown could not examine them in chief, but only by way of re-examination, and therefore must confine himself to what arose out of the cross-examination. See also the remarks of Mills, J., on this point, in *Braydon v. Goulman*, 1 Mon. (Ky.) 115, 117, 118; *R. v. Stimpson*, 2 Car. & P. 415; *Knapp v. Haskall*, 4 Id. 590; *Whittingham v. Bloxham*, Id. 597; *Rowe v. Brenton*, 3 Mann. & Ry. 133; *Giles v. Powell*, 2 Car. & P. 259; *George v. Radford*, 3 Id. 464; *Brown v. Giles*, 1 Id. 118.



Another rule, or rather another form of the rule just discussed, which may be briefly noticed here, is that which requires the plaintiff to give evidence-in-chief, anticipating or avoiding some supposed defence set up in a special plea interposed by the defendant. This rule is thus stated in a leading English case: "When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel may, if they please, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justifications, by way of anticipating the defence; or, if they please, content themselves with proving the fact on the general issue, and then close their case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved by the defendant, in support of the justifications, and they cannot be allowed to go beyond it."<sup>1</sup> In some States, notably Pennsylvania, greater indulgence in respect of the order of proof is allowed;<sup>2</sup> but the whole matter lies in the discretion of the presiding judge, and belongs more particularly to the general law of evidence and pleading than to that of witnesses, and needs no further consideration here.

§ 234. **Power of Court to control and limit.**—The time and manner of examining a witness is in the discretion of the judge before whom the trial is had.<sup>3</sup> This discretion extends to determine the length of time,<sup>4</sup> and the extent<sup>5</sup> to which the witness may be examined. If counsel persist in an improper course of examination, tending to delay or embarrass the opposite party, or to hinder the course of justice,

<sup>1</sup> *Pierpont v. Shapland*, 1 Car. & P. 437. See also *Wharton v. Lewis*, 1 Car. & P. 529; *Scott v. Woodward*, 2 McCord (S. C.) 161.

<sup>2</sup> *Curren v. Connery*, 5 Binn. (Pa.) 488; *Richardson v. Stewart*, 4 Id. 198; *Culbush v. Gilbert*, 4 S. & R. (Pa.) 551.

<sup>3</sup> *Duncan v. McCullough*, 4 S. & R. (Pa.) 480.

<sup>4</sup> *Mulhollin v. State*, 7 Ind. 646; *Morcin v. Solomons*, 7 Rich. (S. C.) 97.

<sup>5</sup> *Adriance v. Arnot*, 31 Mo. 471.

the judge may send the witness from the stand.<sup>1</sup> So he may interfere and protect the witness against irrelevant inquiries,<sup>2</sup> and overrule a question repeated after being several times substantially answered,<sup>3</sup> and allow the witness to finish a proper answer to a proper question before permitting another to be put.<sup>4</sup>

The judge has an unlimited right, in its discretion, to interrogate the witness himself, both in civil and criminal cases,<sup>5</sup> even to the extent of asking leading questions.<sup>6</sup>

So also the court is the exclusive judge whether a witness understands the obligation of an oath, and has sufficient intelligence to testify;<sup>7</sup> and may compel counsel to disclose, before examining a witness, what he expects to prove by him.<sup>8</sup> Again, the court may limit the number of witnesses to be examined in proof of a particular fact;<sup>9</sup> and one who complains that the court refused to permit a particular witness to be sworn, must show that such witness was competent, or it will be presumed that he was not.<sup>10</sup>

§ 235. **The Oath or Affirmation.** — To render the *viva voce* testimony of a witness legal evidence, it must be given under the solemn sanction of an oath or affirmation; and it is the duty of the party calling him to see that he is sworn.<sup>11</sup> As to the manner of administering the oath, the peculiar cere-

<sup>1</sup> Peck v. Richmond, 2 E. D. Smith (N. Y.) 380.

<sup>2</sup> Varona v. Socarras, 8 Abb. (N. Y.) Pr. 302.

<sup>3</sup> Morcin v. Solomons, 7 Rich. (S. C.) 97.

<sup>4</sup> State v. Scott, 80 N. C. 365.

<sup>5</sup> Epps v. State, 19 Ga. 102.

<sup>6</sup> Huffman v. Cauble, 86 Ind. 591; Com. v. Galavan, 9 Allen (Mass.) 271.

<sup>7</sup> State v. Perry, Busb. (N. C.) L. 330. See *supra*, §§ 2, 12.

<sup>8</sup> People v. White, 14 Wend. (N. Y.) 111. *Contra*, see Force v. Smith, 1 Dana (Ky.) 151.

<sup>9</sup> Gray v. St. John, 35 Ill. 222; Anthony v. Smith, 4 Bosw. (N. Y.) 593.

<sup>10</sup> Davis v. McElvin, 1 Ind. 136; Whitewater Valley Canal Co. v. Dow, Id. 141. See also Singleton's Will, 8 Dana (Ky.) 315.

<sup>11</sup> Hawks v. Baker, 6 Me. 72, where a witness having testified, believing that he had been sworn, but by some oversight the oath had been omitted, and this was not discovered by either party till after the trial; nevertheless the verdict was set aside. *Contra*, Cady v. Norton, 14 Pick. (Mass.) 236, and Slaughter v. Whitelock, 12 Ind. 338, where it is held that the objection must be made as soon as the omission is discovered, or the error will be waived. In Nesbitt v. Dallam (7 Gill & J. (Md.) 494), it is said that if a party admits proof to be taken in a cause without an oath, after it has been acted upon and made the basis of a judgment, he cannot object to its admissibility. S. P., Lawrence v. Houghton, 5 Johns. (N. Y.) 129. See also White v. Hawn, Id. 351; Blanchard v. Richley, 7 Id. 198.

mony adopted in his own country, or<sup>1</sup> among those of the same religious belief as himself, or which he deems most binding on his conscience, is to be resorted to.<sup>1</sup> Jews may be sworn on the Pentateuch, with covered head;<sup>2</sup> Mahometans, upon the Koran;<sup>3</sup> Gentoos, by touching the foot of a Brahmin;<sup>4</sup> Chinese, by the ceremony of killing a cock, or breaking a saucer, the witness declaring that if he speaks falsely, his soul will be similarly dealt with;<sup>5</sup> a Scotch covenantanter, and a member of the Scottish Kirk, by holding up the hand, without kissing the book.<sup>6</sup> Quakers, and others who profess to entertain conscientious scruples against taking an oath in the usual form, are allowed to make an affirmation, *i.e.* a solemn religious asseveration, that their testimony shall be true.<sup>7</sup> A wilful, false oath under such circumstances is perjury.<sup>8</sup>

A witness need be sworn but once, though examined on different days, and the issues may vary during the trial.<sup>9</sup> The answer he makes to the clerk, when demanding his name, is a part of his testimony.<sup>10</sup> If sworn before the arraignment, on a criminal trial, but after the prisoner has signified his readiness to go on, it is unnecessary to re-swear him.<sup>11</sup> If competent as a witness-in-chief, he must be sworn in chief, although called to prove a particular fact only.<sup>12</sup>

<sup>1</sup> *Ormychund v. Barker*, 1 Atk. 21.

<sup>2</sup> *Id.* p. 40, 42; *Willes*, 543; *Cowp.* 389; or on the Bible, if they say they are Christians. *R. v. Gilham*, 1 Esp. N. P. 285. And even a Christian may be sworn on the Old Testament, if he says he considers that a more binding form. *Edmonds v. Rowe*, Ry. & Moo. N. P. 77.

<sup>3</sup> *Morgan's Case*, 1 Leach, C. C. 64; *Fachina v. Sabine*, 2 Str. 1104.

<sup>4</sup> See *Ormychund v. Barker*, 1 Atk. 21.

<sup>5</sup> *R. v. Enhehman*, Car. & Marsh. 249; *R. v. Alsley*, O. B. Sess. 1804; *Peake Ev.* 141 n (5 ed.).

<sup>6</sup> *Mildrone's Case*, 1 Leach C. C. 459; *Walker's Case*, *Id.* 498; *Dutton v. Colt*, 2 Sid. 6; *Mee v. Reid*, *Peake*, N. P. 22. And so may an ordinary American witness. *Gill v. Caldwell*, 1 Ill. 28; *Doss v. Birks*, 11 Humph. (Tenn.) 431; unless objection be

made at the time. *McKinney v. People*, 7 Ill. 540.

<sup>7</sup> U. S. Rev. Stat. § 1. The usual form is, "You do solemnly, sincerely, and truly declare and affirm," etc. N. Y. Code Civ. Pro. § 847. In Massachusetts, in early times, liberty to affirm was confined to Quakers. *United States v. Coolidge*, 2 Gall. (U. S.) 364. In New Jersey, a witness who does not object to being sworn cannot be allowed to affirm. *Williamson v. Carroll*, 1 Harr. (N. J.) 217.

<sup>8</sup> *Sells v. Hoare*, 3 Bro. & B. 232.

<sup>9</sup> *Bullock v. Koon*, 9 Cow. (N. Y.) 30.

<sup>10</sup> *People v. Winters*, 49 Cal. 383.

<sup>11</sup> *State v. Weber*, 22 Mo. 321.

<sup>12</sup> Unless he be a party to the record, called to prove the loss or destruction of a paper. *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369.

The fact that the oath is more comprehensive than the statute requires is no objection to its validity.<sup>1</sup> The meaning of the oath, "to tell the whole truth" is, to tell so much of it as may be competent evidence, and may not tend to criminate the witness himself.<sup>2</sup>

§ 236. *Interpreters.* — A witness who is unable to speak the English language intelligibly must, for obvious reasons, testify through the medium of a translator, or interpreter, of the language in which he answers the questions put to him.<sup>3</sup> Thus, as we have already seen, a deaf-mute may testify by signs, which may be interpreted to the court and jury,<sup>4</sup> and the whispers of a witness, at the moment physically incapable of speaking aloud, may be repeated by some suitable person appointed by the court.<sup>5</sup> Where there is no statutory provision for the employment of interpreters, the fact that one was employed at the trial will raise a presumption, on appeal, that the parties agreed upon that course, in the absence of any showing of unfitness, partiality, or unfairness upon the part of the person so employed.<sup>6</sup>

The interpreter is sworn truly to interpret between the court, the jury, and the witness; the oath is then administered to the witness in English, and interpreted to him by the sworn interpreter, as it is pronounced by the clerk.<sup>7</sup> The interpreter should be instructed to interpret and report to the court every statement made by the witness.<sup>8</sup> In one case it is held that he may take advantage of the suggestions of others who are not sworn, with regard to the proper interpretation of testimony, stating the result to the court as his own interpretation;<sup>9</sup> but to the writer this seems a rather dangerous doctrine for general application. If either party conceives that he has erroneously translated a word or phrase, he may show that fact; and where two interpreters disagree as to the meaning of the word used (one saying that it means "fall," another, "blow"), the court should require them to give the primary signification of all the words used in con-

<sup>1</sup> *Ballance v. Underhill*, 4 Ill. 453.

<sup>6</sup> *Leetch v. Atlantic Mut. Ins. Co.*,

<sup>2</sup> *Com. v. Reid*, 1 Leg. Gaz. Rep. (Pa.) 182.

<sup>4</sup> *Daly (N. Y.)* 518.

<sup>3</sup> See *Norberg's Case*, 4 Mass. 81; *Amory v. Fellows*, 5 Id. 226.

<sup>7</sup> *Norberg's Case*, 4 Mass. 81.

<sup>8</sup> *People v. Wong Ah Bang*, 3 West Coast Rep. 58.

<sup>4</sup> *Supra*, § 6.

<sup>5</sup> *Conner v. State*, 25 Ga. 515.

<sup>9</sup> *United States v. Gibert*, 2 Sumn. (U. S.) 19.

nection therewith, that the jury may judge.<sup>1</sup> Where documents in a foreign language were written by the witness himself, he may translate them to the jury, without being sworn as an interpreter.<sup>2</sup>

§ 237. **Separate Examination — Exclusion from Court-Room.** Upon this topic there is considerable lack of harmony in the decided cases. It is well settled, however, that the court has the *power*, in the exercise of a sound discretion, to sequester witnesses, or put them "under the rule," as it is sometimes called; *i.e.*, to order the withdrawal from the court-room of all the witnesses in the case, except the one then undergoing examination;<sup>3</sup> and that the action of the court in the matter will not be revised in the absence of proof of an abuse of this discretionary power.<sup>4</sup> This is not an arbitrary discretion, and the proper practice, at least in Texas, is to require consent of counsel to any relaxation of the rule in force in that State, that sequestration shall always take place in criminal cases.<sup>5</sup> In Wisconsin, it is held, in an early case, that only the witnesses on the same side as the one on the stand can be excluded.<sup>6</sup>

In some jurisdictions this separation of the witnesses is held to be a matter of right,<sup>7</sup> while in others it is not of right, but of favor only;<sup>8</sup> and even where the order of exclusion is disobeyed, the court has a discretionary power to permit the examination of the disobedient witnesses,<sup>9</sup> or to reject their testimony.<sup>10</sup> Other decisions maintain that disobedience of the rule does not disqualify a witness from testifying, but goes to his credit only;<sup>11</sup> and that the court has no power to

<sup>1</sup> *Schnier v. People*, 23 Ill. 17.

<sup>2</sup> *Kuhlman v. Medlinka*, 20 Tex. 385.

<sup>3</sup> *Errissman v. Errissman*, 25 Ill. 136; *McLean v. State*, 16 Ala. 672; *Johnson v. State*, 2 Ind. 652; *People v. Green*, 1 Park (N. Y.) Cr. 11.

<sup>4</sup> *Powell v. State*, 13 Tex. App. 244; *Nelson v. State*, 2 Swan (Tenn.) 237.

<sup>5</sup> *Heath v. State*, 7 Tex. App. 464.

<sup>6</sup> *Benaway v. Conyne*, 3 Chand. (Wis.) 214.

<sup>7</sup> *Johnson v. State*, 14 Ga. 55; *State v. Zellers*, 2 Halst. (N. J.) 220; *Watts v. Holland*, 56 Tex. 54; *Southey v.*

*Nash*, 7 Car. & P. 632; *Alison's Scotch Pr.* pp. 542-545.

<sup>8</sup> *Porter v. State*, 2 Ind. 435; *Hanvey v. State*, 68 Ga. 612; *State v. Brookshire*, 2 Ala. 303; *Sidgreaves v. Myatt*, 22 Ala. 617; *Sartorius v. State*, 24 Miss. 602; *State v. Fitzsimmons*, 30 Mo. 236; *Laughlin v. State*, 18 Ohio, 99; *R. v. Cook*, 13 How. St. Tr. 348; *R. v. Vaughan*, Id. 494; *R. v. Goodere*, 17 Id. 1015.

<sup>9</sup> See cases last cited; also *State v. Sparrow*, 3 Murph. (N. C.) 487; *Bulliner v. People*, 95 Ill. 394.

<sup>10</sup> *Jackson v. State*, 14 Ind. 327; *Dyer v. Morris*, 4 Mo. 214.

<sup>11</sup> *Pleasant v. State*, 15 Ark. 624;

exclude him from the witness-box, and commits reversible error in so doing;<sup>1</sup> the only effect of such disobedience on the part of the witness being to render him amenable to punishment for contempt.<sup>2</sup>

In applying the rule of sequestration, it has been considered proper to except from its application a party in interest though not of record, who was also a witness,<sup>3</sup> and the same course was taken with the agent of a party whose presence was necessary to assist counsel;<sup>4</sup> and with a witness who was one of the counsel in the case on trial.<sup>5</sup> Expert witnesses, also, whose opinions must often of necessity be based upon facts sworn to by the other witnesses, are commonly allowed to remain in the court-room.

In the face of so great a diversity of judicial opinion, any attempt to harmonize, or to deduce a uniform rule of practice from the adjudications, would be futile.

§ 238. **What Questions are Proper.**— Few general rules can be laid down as to this topic, inasmuch as the propriety of the questions put by a party to his own witness, in proof of his case, must, in the nature of things, depend to a very great extent, upon the particular circumstances to be proved. The object of the examination is to elicit the truth; to get at the facts, or such of them as bear upon the issue in favor of the party calling the witness. As a general rule the questions put to the witness must call for his knowledge of some fact, of present or past existence; they must not, except in special cases hereafter to be considered,<sup>6</sup> be framed to elicit the impressions or opinions of the witness.

*Betts v. State*, 66 Ga. 508; *Grimes v. Martin*, 10 Iowa, 347. And see also *Hopper v. Commonwealth*, 6 Gratt. (Va.) 684; *Hey v. Commonwealth*, 32 Id. 946.

<sup>1</sup> *People v. Boscovitch*, 20 Cal. 436; *Keith v. Wilson*, 6 Mo. 435; *State v. Salge*, 2 Nev. 321; *Hubbard v. Hubbard*, 7 Oreg. 42; *Smith v. State*, 4 Lea (Tenn.) 428; *Chandler v. Horne*, 2 M. & Rob. 423.

<sup>2</sup> *Rooks v. State*, 65 Ga. 330; *Lassiter v. State*, 67 Ga. 739; *Bulliner v. People*, 95 Ill. 394.

<sup>3</sup> *Chester v. Bower*, 55 Cal. 46.

<sup>4</sup> *Ryan v. Couch*, 66 Ala. 244; *Betts v. State*, 66 Ga. 508.

<sup>5</sup> *Powell v. State*, 13 Tex. App. 244; *Pomeroy v. Baddeley, Ry. & Moo.* 430; *Everett v. Lowdham*, 5 Car. & P. 91.

As to the sufficiency of the withdrawal and separation of the witnesses, and matters of practice connected therewith, see *Wade v. State*, 65 Ga. 756; *Horne v. Williams*, 12 Ind. 324; *Anonymous*, 1 Hill (S. C.), 251, 254-256; *State v. McElmurray*, 3 Strobb. (S. C.) 33; *Woods v. McPheran, Peck* (Tenn.) 371.

<sup>6</sup> *Infra*, Chaps. XXV., XXVI.

The issue, also, must be kept in mind by the questioner, and only material and relevant facts, not those which are collateral and impertinent, may be inquired about.<sup>1</sup> But it is not necessary that every question put to a witness shall be so broad and comprehensive, that the answer shall be evidence of some issue in the case. If all the answers to a series of questions upon the same general subject, taken together, are competent, each is competent, and a question tending to elicit such an answer should be allowed.<sup>2</sup> Each question should call for a fact and not a conclusion of law, and should not embrace the whole merits of the case.<sup>3</sup> It is no objection to a question that it assumes facts which are undisputed;<sup>4</sup> but a question based upon the supposition of facts not proved, is improper.<sup>5</sup> So, also, a compound question, one part being admissible, and the remainder inadmissible, may be rightfully excluded as a whole.<sup>6</sup> But counsel are often allowed to ask apparently irrelevant and consequently inadmissible questions, upon their promise to follow them up at the proper time, by proof of other facts, which, if true, would make the question put legitimately operative.<sup>7</sup>

§ 239. **Inquiry as to Intent or Motive.**—It is quite well settled that where the intent or motive which actuated a person in doing a particular act or making a particular declaration becomes a material question for decision, that person may be asked, as a witness, to state what his intent or motive was, it being a matter peculiarly within his own knowledge;<sup>8</sup>

<sup>1</sup> But if the answer to a question asked may tend to prove or may form part of the proof of the matters alleged, though not wholly sufficient to prove them, it may be asked. *Schuchardt v. Allens*, 1 Wall. (U. S.) 359. See also *Lyon v. Tallmadge*, 14 Johns. (N. Y.) 501.

<sup>2</sup> *Atchison &c. R. R. Co. v. Stanford*, 12 Kan. 354.

<sup>3</sup> *Caspar v. O'Brien*, 15 Abb. (N. Y.) Pr. n. s. 402; *Wall v. Williams*, 11 Ala. 826; *Tomlin v. Hilyard*, 43 Ill. 300; *Hogan v. Reynolds*, 8 Ala. 59; *Braman v. Bingham*, 26 N. Y. 483.

<sup>4</sup> *Willey v. Portsmouth*, 35 N. H. 303.

<sup>5</sup> *People v. Graham*, 21 Cal. 261; *Carpenter v. Ambrosan*, 20 Ill. 170. See also *Sanderlin v. Sanderlin*, 24 Ga. 583; *Klock v. State*, 19 N. W. Rep. 543; *State v. Smith*, 49 Conn. 376.

<sup>6</sup> *Wyman v. Gould*, 47 Me. 159; *George v. Norris*, 23 Ark. 121; *Whiteford v. Burckmeyer*, 1 Gill (Md.) 127.

<sup>7</sup> *Wygert v. Norton*, 4 Mich. 286. And see *Votaw v. Diehl*, 62 Iowa, 676.

<sup>8</sup> *Conway v. Clinton*, 1 Utah, 215; *Cortland Co. v. Herkemir Co.*, 44 N. Y. 22. But see *Whetstone v. Bank at Montgomery*, 9 Ala. 875.

and this is so even though the witness be a party to the suit,<sup>1</sup> or the defendant in a criminal prosecution.<sup>2</sup>

Thus, it has been held that a party may be asked whether, in entering into a contract on which the action is based, he relied upon the representations of the other party;<sup>3</sup> the testimony of an assignor may be taken as to his intent in making the assignment;<sup>4</sup> and on the issue whether a conveyance was executed by the grantor with knowledge of its contents, she may testify that she never intended to convey her land to the grantee.<sup>5</sup>

But it is held in Alabama, that where the intent is the very question in issue, neither a party nor any other witness can testify with what intent he did the act in question; the intent should be found by the jury from the attendant circumstances.<sup>6</sup> So, also, in Maine, a party is not allowed to prove by his own witness, what the purpose of the witness' mind was on a former occasion.<sup>7</sup> And a witness cannot be asked to state the "motives or intentions" of another person in doing a given act.<sup>8</sup>

§ 240. **Rule forbidding Leading Questions.**—It is an elementary rule, that on the direct examination of a witness, leading questions, *i.e.*, questions indicating or suggesting the answers the party wishes should be given, cannot be put.<sup>9</sup> This rule proceeds partly on the supposition that the witness is favorable to the party who calls him. That party, in preparing his case for trial, has a full opportunity of examining his witnesses beforehand, in private, and of producing on the trial those only whose testimony he believes will serve

<sup>1</sup> *Shockey v. Mills*, 71 Ind. 288; *More v. Deyoe*, 22 Hun (N. Y.) 208. *Contra* as to an uncommunicated motive or intent. *Burke v. State*, 2 Ala. L. J. 313. And see also *Ballard v. Lockwood*, 1 Daly (N. Y.) 158.

<sup>2</sup> *Greer v. State*, 53 Ind. 420. S. P., *White v. State*, Id. 595; *Kerrains v. People*, 60 N. Y. 221.

<sup>3</sup> *Berkey v. Judd*, 22 Minn. 287.

<sup>4</sup> *Watkins v. Wallace*, 19 Mich. 57; *Forbes v. Waller*, 25 N. Y. 430.

<sup>5</sup> *Perry v. Porter*, 121 Mass. 522.

<sup>6</sup> *Oxford Iron Co. v. Spadley*, 51 Ala. 171.

<sup>7</sup> *Law v. Payson*, 32 Me. 521. S. P., *Palmer v. Pinkham*, 33 Me. 32.

<sup>8</sup> *Peake v. Stout*, 8 Ala. 647. S. P., *Green v. Akers*, 55 Ga. 159. But compare *Weaver v. Lapsley*, 42 Ala. 601, which case seems to lean a little the other way.

<sup>9</sup> *Snyder v. Snyder*, 6 Binn. (Pa.) 483; *People v. Mather*, 4 Wend. (N. Y.) 229; *Torrance v. Hurst*, 1 Walk. (Miss.) 403; *Stringfellow v. State*, 26 Miss. 157; *Page v. Parker*, 40 N. H. 47; *Able v. Sparks*, 6 Tex. 349; *Mathis v. Buford*, 17 Tex. 152; *United States v. Dickinson*, 2 McLean (U. S.) 325; *Parkin v. Moon*, 7 Car. & P. 408.



his own purposes; therefore the assumption that a witness is favorable to the party calling him is well founded in fact. The pernicious influence of such questions is most felt, and most to be feared, when the object of an inquiry is to ascertain the details of a conversation, admission, or agreement; and more rigor is, in such cases, justified in confining the direct examination to its appropriate rules.<sup>1</sup>

But this, like many other rules of evidence, is not inflexible, but may, under certain peculiar circumstances, be relaxed, or altogether abandoned, at the discretion of the presiding judge. The exercise of this discretion cannot, ordinarily, be appealed from;<sup>2</sup> but when its effect is to deprive the party of competent testimony, an appeal is allowable.<sup>3</sup> This discretion, however, should only be exercised in the direction of allowing the questions where it appears essential to promote justice,<sup>4</sup> and a clear abuse of it is ground for reversal.<sup>5</sup>

§ 241. **What Questions are Leading.** — (1) *In general.* Generally speaking, questions are objectionable as leading, not only when they directly suggest the desired answer, but also when, embodying a material fact, they admit of an answer by a simple "yes," or "no," though neither the one nor the other is directly suggested.<sup>6</sup> But it is a mistake to suppose such only is a leading question, to which "yes" or "no" would be a conclusive answer;<sup>7</sup> if any answer is plainly indicated, the question is leading, and not the less so because propounded in the alternative, whether or not, etc.<sup>8</sup> The objec-

<sup>1</sup> *Per* Marcy, J., in *People v. Mather*, 4 Wend. (N. Y.) 248.

<sup>2</sup> *Blevins v. Pope*, 7 Ala. 371; *Donnell v. Jones*, 13 Ala. 490; *Parmelee v. Austin*, 20 Ill. 35; *State v. Lull*, 37 Me. 246; *York v. Pease*, 2 Gray (Mass.) 282; *Green v. Gould*, 3 Allen (Mass.) 465; *Smith v. Hutchings*, 30 Mo. 380; *Severance v. Carr*, 43 N. H. 65; *Walker v. Dunspaugh*, 20 N. Y. 170; *Sears v. Shafer*, 1 Barb. (N. Y.) 408; *Budlong v. Van Nostrand*, 24 Id. 25; *Barton v. Kane*, 17 Wis. 37.

<sup>3</sup> *Gunter v. Watson*, 4 Jones (N. C.) L. 455. S. P., *Parsons v. Bridg-*  
*ham*, 34 Me. 240.

<sup>4</sup> *Williams v. Jarrot*, 6 Ill. 120;

*Cheaney v. Arnold*, 18 Barb. (N. Y.) 434. S. P., *Doran v. Mullen*, 78 Ill. 342; *State v. Benner*, 64 Me. 267. See also *Birely v. Staley*, 5 Gill & J. (Md.) 432.

<sup>5</sup> *App. v. State*, 90 Ind. 73.

<sup>6</sup> *United States v. Angell*, 11 Fed. Rep. 34. But see *Spear v. Richardson*, 37 N. H. 23; *McKeown v. Harvey*, 40 Mich. 226.

<sup>7</sup> *People v. Mather*, 4 Wend. (N. Y.) 229, 247, 248; *Weber v. Kingsland*, 8 Bosw. (N. Y.) 438, 439.

<sup>8</sup> *State v. Johnson*, 29 La. Ann. 717; *People v. Mather*, *supra*; *Weber v. Kingsland*, *supra*; *Bartlett v. Hoyt*, 33 N. H. 151.

tion is, that the evidence so drawn from the witness, is not his genuine unassisted testimony, but a statement artfully contrived, shaped, and colored by professional skill, with a complete knowledge of the facts which the party seeks to establish. If such a mode of examination were allowed, it must frequently happen that a witness would not state the whole of a transaction, but a part only would be elicited, and that to serve a particular purpose; the chance also of detecting discrepancies in false or erroneous testimony would be much diminished. Nor would these inconveniences be entirely removed by the power of cross-examination, which, as it must often be conducted without any previous knowledge of the answers to be given by the witness, is not a counterbalance to the facility afforded in the examination-in-chief, of presenting a selected and concerted portion only of the facts.<sup>1</sup>

(2) *Questions directing witness' attention to subject of inquiry, or fact overlooked by witness.* Where the object of the counsel conducting the direct examination of his own witness, is merely to call back or direct the latter's attention to the particular subject of the inquiry, a question put with that end in view is not objectionable as "leading, suggestive, or assuming what is not proved," because couched in the language of a pleading in the case.<sup>2</sup> Thus, where a witness testifies as to work and labor done, and money received, for which plaintiff is seeking to recover, it is competent to inquire whether other work had been done or money received. Such a question, though it directs the attention of the witness that he may state the facts fully, cannot be said to be leading.<sup>3</sup>

So, also, where an omission is caused by want of memory, a suggestion may be permitted to assist it. Thus, where a witness called to prove the partnership of the plaintiffs, could not, at the moment, recall the individual names of the several partners, he was allowed to be asked whether certain specified persons were members of the firm.<sup>4</sup> This practice

<sup>1</sup> 2 Phil. Ev. \*889.

<sup>2</sup> *Shields v. Guffey*, 9 Iowa, 322. But a question referring the witness to a previous deposition by him in the same cause, and asking him if his answers therein were true, is leading and inadmissible. *Trammell v. McDade*, 29 Tex. 360. In support of the

text, see *Lowe v. Lowe*, 40 Iowa, 220; *Long v. Steiger*, 8 Tex. 460.

<sup>3</sup> *Strawbridge v. Spann*, 8 Ala. 820. *S. P.*, *Mathis v. Buford*, 17 Tex. 152; *Carlyle v. Plumer*, 11 Wis. 96. See also note 575 in 2 Phil. Ev. \*890.

<sup>4</sup> *Acerro v. Petroni*, 1 Stark. 100. *S. P.*, *Huckins v. People's Ins. Co.*,

is analogous to that of refreshing the memory by reference to some writing, which will be hereafter considered.<sup>1</sup>

(3) *Introductory questions.* Questions of a merely introductory character, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the case, are not liable to objection as leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked whether the one defendant has interfered in the business of the other.<sup>2</sup> And where the identification of the person of a prisoner is necessary, a witness may be asked whether the person pointed out to him is the person in question.<sup>3</sup>

31 N. H. 238; *O'Hagan v. Dillon*, 76 N. Y. 170.

<sup>1</sup> *Infra*, Chap. XXIV.

<sup>2</sup> *Nicholls v. Dowding*, 1 Stark. 81.

<sup>3</sup> *R. v. Watson*, 2 Stark. 128; *R. v. Berenger*, Id. 129 n. S. P., *Long v. Steiger*, 8 Tex. 460; *Sadler v. Murrah*, 3 How. (Miss.) 195; *People v. Mather*, 4 Wend. (N. Y.) 229.

In applying the foregoing principles stated in the text, the courts have held the following questions to be leading and inadmissible:—

“Whether witness [the clerk of A] was in the habit of acting by A's consent and with his approbation to every extent, in reference to buying goods etc., in A's absence?” *Lee v. Tinges*, 7 Md. 215.

“Whether or not defendant admitted, in conversation, that plaintiff had not received his portion of the estate?” *McLean v. Thorp*, 3 Mo. 315.

“Did you make any agreement at that time?” *Dudley v. Elkins*, 39 N. H. 78.

“Did the defendant state to you, and in your presence, on the morning and just before he sent you for said sheep, that it was not his, and not to bring it over?” *Luttrell v. State*, 14 Tex. App. 147.

“State whether or not you examined the horse-tracks towards Crogan's,” and “State whether or not you had any difficulty in following the

tracks.” *Hopper v. Commonwealth*, 6 Gratt. (Va.) 684.

And in a rape case, the following questions asked of the prosecutrix on her direct examination were excluded as leading:—

“Did the prisoner then, or at any subsequent time, say anything to you in relation to this matter to dissuade you from disclosing it? State when, where, and what he said. Did the prisoner, at any time subsequent to the transaction, say anything to you about what judgment the laws of Mississippi would inflict on you, or him, or both? State it all. If the prisoner, in any of his antecedent conversations, offered property or any other advancement to you, in order to attach you to him, say so.” *Turney v. State*, 16 Miss. 104.

The following questions have been held not objectionable as leading:—

“Do you know any circumstances which will show that the defendant knew his son went to school in the year 1854?” *Floyd v. State*, 30 Ala. 511.

“Do you know whether A B was ever prosecuted for stealing a gray stud horse; if so, by whom and where?” *Sexton v. Brock*, 15 Ark. 345.

“Whom did you see watching around the house?” *People v. De Witt*, 10 Pac. Rep. 212.

“Did he court her?” [Breach of

§ 242. **When one may lead his own Witness.**—(1) *Unwilling or hostile witness.* Where the witness appears to be hostile to the party calling him, or in the interest of the opposite party, or unwilling to testify fully, the court is clothed with a discretion to relax the rule forbidding leading questions, and will often allow the direct examination to assume something of the form of cross-examination, by permitting the putting of leading questions.<sup>1</sup> But this is solely a matter of discretion, and no exception will lie to the refusal of the court to allow a party to lead his own witness on discovering him to be the agent of his adversary.<sup>2</sup>

promise case.] *Greenup v. Stoker*, 8 Ill. 202.

"Whether or not testator's insanity took the form of dislike to his relatives, and friends?" *Pelamourges v. Clark*, 9 Iowa, 1.

"What have you seen by the way of intoxicating liquors being sold, between July 1, 1860, and April 15, 1861, in that building?" *State v. Schilling*, 14 Iowa, 455.

"Did you notice during the spring any weakening of A's mind?" and "In your opinion, during the spring of 1877, had A's mind weakened?" *Fraser v. Jennison*, 42 Mich. 206.

"What was the nature of the conversation between said parties, and were they in earnest, or was the talk a matter of joke between them?" *Willis v. Quimby*, 31 N. H. 485.

"Did you do anything to sell or dispose of the clapboards other than to say that if you could sell them you would indorse them on the note, or did you do anything to measure or survey them?" *Hale v. Taylor*, 45 N. H. 405.

"For whom did your husband do what business he did after you took the deed?" *Knapp v. Smith*, 27 N. Y. 277.

"For whom did you purchase that judgment?" and "In your negotiation with the (judgment creditor) for whom were you acting?" *Carnes v. Platt*, 6 Robt. (N. Y.) 270.

"Did Peter Rhoades tell you where that corner was?" *Kemmerer v. Edelman*, 23 Pa. St. 143.

"Was it or was it not made known to the board of directors, at any time, by J. W. or any one else, that the property which J. W. offered to mortgage had been previously deeded by himself and wife to any one else?" and "Had you or not, as a director, any knowledge that W. and wife had made a deed for the property to any one before he mortgaged it to the bank?" *Wilson v. McCullough*, 23 Pa. St. 440.

<sup>1</sup> *R. v. Murphy*, 8 Car. & P. 306; *Bastin v. Carew*, Ry. & Moo. 127; *R. v. Chapman*, 8 Car. & P. 558; *Bradshaw v. Coombs*, 102 Ill. 428; *Commonwealth v. Thrasher*, 11 Gray (Mass.) 57; *People v. Mather*, 4 Wend. (N. Y.) 229, 257; *Bank of Northern Liberties v. Davis*, 6 Watts & S. (Pa.) 285; *Towns v. Alford*, 2 Ala. 378.

<sup>2</sup> *Wells v. Jackson &c. Manuf. Co.*, 48 N. H. 491, citing *People v. Mather*, *supra*. *Contra*, *Parsons v. Bridgham*, 34 Me. 240; *Steene v. Aylesworth*, 18 Conn. 244, where it is said the exclusion of such questions will be reviewed in a clear case.

The exception to the rule is allowed on the general ground of the witness appearing unwilling to depose in favor of the party by whom he is adduced. This unwillingness is to be decided by the judge, and commonly according to his impression of the witness' demeanor at the trial. The situation of the witness, and the inducements which he may have for withholding a fair account, are also

(2) *Leading for the purpose of contradicting a former witness.* How far leading questions may be put in an examination-in-chief, when the object is to prove that another witness, examined on the opposite side, has, on some former occasion, made a different and contradictory statement, seems somewhat doubtful. If, for example, a witness, on cross-examination, were to deny that he ever gave a different account of the transaction, or that, in conversing upon the subject with a third person, he used certain words or expressions imputed to him, it is a question, says Mr. Phillips, whether it would be competent to the counsel in examining the third person, in chief as his witness, for the purpose of contradicting the former witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or used such and such expressions. This form of putting the question is certainly not uncommon, and frequently passes without objection. But a very little consideration will show that such a leading question is irregular.<sup>1</sup> The more proper course "would be to inquire generally, what the former witness said, or what account he gave, relative to the transaction in question — thus leaving him, as in fairness he ought to be left, to the use of his own memory. If the witness has a distinct recollection of the conversation, and of the representation made by the other person, whose account is now disputed, he requires only to have his attention directed to the subject, to enable him to speak what he knows; if he has not that distinct recollection, he is ill qualified to contradict the other witness, as to the expressions supposed to have been used by him; in other words, he is incompetent for the pur-

—very proper circumstances to be taken into consideration in forming this decision. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness; a servant will not, in an action against his master, be very ready to acknowledge the negligence committed by himself. Perhaps the principle which requires a party to abide by the whole of what his own witness has sworn, or wholly to abandon it, is, in this case, subject to an exception; for there certainly is no testimony, the veracity of which is less suspicious,

than the admission extorted from an unwilling witness; and it would materially prejudice the interests of justice, if a witness of this description could place the party producing him in the dilemma of either abandoning the benefit of the truth, which has been with difficulty obtained, or adopting all the falsehood which the witness may have the iniquity to mix up with it. 2 Phil. Ev. \*892 *n.* And see *Moody v. Rowell*, 17 Pick. (Mass.) 498.

<sup>1</sup> 2 Phil. Ev. \*893. See also *Snyder v. Snyder*, 6 Binn. (Pa.) 483.

pose for which he is called. The plea of necessity, therefore, altogether fails. But the principal objection to such leading questions appears to be, that they suggest the desired answer so broadly and obviously, that a witness of the dullest intellect and weakest memory can hardly fail to take the hint, and may easily shape his evidence, if he is so disposed, as may best serve the interest and wishes of the party who calls him. In effect, the question puts into the mouth of the witness the very words which he is to echo back either in the affirmative or in the negative—thus supplying a forgetful witness with a false memory, and an artful witness with a prompt and concerted answer. Is there, then, anything in the nature of this particular case which ought to exempt it from the general rule applicable to examinations-in-chief? On the contrary, if there is any case in which that general rule against leading ought to be strictly maintained, it is the one now under consideration, where a witness is called for the purpose of proving the account given by another witness to be inconsistent with some former statement, supposed to have been made by him. Whether the question at issue between the two witnesses is a question of credit, or whether it is to be considered rather as a question of mere memory, leading is, in either point of view, equally objectionable.

“If it is a question of memory, the only fair way of trying it is by allowing the witness to speak for himself unprompted, as his own memory may suggest. If the question is one of credit, then it is undoubtedly due to the witness whose veracity is impeached that the contradictory statement, supposed to have been made by him, should be distinctly proved, without the aid of leading and without any undue influence. Upon the whole, therefore, the most unexceptionable and proper course appears to be, to ask the witness, who is called to prove a contradictory statement made by another witness, what that other witness said relative to the transaction in question, and not in the first instance to ask, in the leading form, whether he said so and so.”<sup>1</sup>

<sup>1</sup> 2 Phil. Ev. \*893; *Evans v. Greene*, 21 Mo. 170; *Harrington v. Lincoln*, 2 Gray (Mass.) 133; *Leavy v. Dearborn*, 19 N. H. 351; *Cornelius v. Commonwealth*, 15 B. Mon. (Ky.) 539; *Allen v. State*, 28 Ga. 395. But see *Potter v. Bissell*, 3 Lans. (N. Y.) 205; and *Rounds v. State*, 57 Wis. 45, where leading questions are held admissible in such cases.

§ 243. **Propriety and Sufficiency of Witness' Answers.**— In responding to the questions put to him, the witness should state *facts*, not *conclusions*—it is the province of the jury, or of the court, not of the witness, to draw conclusions. Thus, a witness will not be permitted to say that one of two persons is a tenant of the other, that being a conclusion of law, but will be required to state the facts out of which the alleged relation arises.<sup>1</sup> So, he cannot state that a defendant is not guilty of the offence charged; he can only state facts known to him, from which the jury can judge of the prisoner's guilt.<sup>2</sup> But there are many exceptions to this rule: thus, it is held, that a witness may state whether or not he is a member of a certain firm, and whether that firm owned certain goods;<sup>3</sup> whether certain persons, at a stated time, entered into a partnership to run a stage line;<sup>4</sup> whether a claim referred to was barred by the statute of limitations;<sup>5</sup> whether a bank was in a solvent condition at a given time;<sup>6</sup> or whether a party had possession of certain real estate at a stated time.<sup>7</sup> So, also, a witness may state a legal conclusion, if the opposite party consents, and failure to object to such an answer has been deemed equivalent to a consent;<sup>8</sup> and he may testify to the *result* of the items of an account, instead of the items themselves, unless objection is made to such form of testifying.<sup>9</sup>

In such instances as those referred to, the evidence has been admitted, either because the answer of the witness, though involving a conclusion of law, related to an *independent fact*, as well, or because abundant opportunity was afforded to get at the facts upon which the witness founded his conclusion by means of the cross-examination—the latter reason for departure from the rule seeming to be less satisfactory than the former.

The most important seeming exception to the rule we are considering exists where a witness is called to testify as to a conversation previously held between himself and another,

<sup>1</sup> *Parker v. Haggerty*, 1 Ala. 632.

<sup>2</sup> *Garret v. State*, 6 Mo. 1.

<sup>3</sup> *Walsh v. Kelly*, 42 Barb. (N. Y.) 98.

<sup>4</sup> *Anderson v. Snow*, 9 Ala. 247.

<sup>5</sup> *Foster v. Spear*, 22 Tex. 226.

<sup>6</sup> *Bank of United States v. Macalester*, 9 Pa. St. 475.

<sup>7</sup> *Parsons v. Brown*, 15 Barb. (N. Y.) 590.

<sup>8</sup> *Sterne v. State*, 20 Ala. 43.

<sup>9</sup> *Clark v. Gridley*, 35 Cal. 398; *Strawbridge v. Spann*, 8 Ala. 820.

or between third persons, and overheard by him. In such cases, according to the clear weight of authority, the rule is, that while the witness should give the words used, if able so to do, yet a general answer embodying the substance or purport is not objectionable where that is all that he can recollect.<sup>1</sup> If he cannot state the precise terms used by the parties in making an agreement overheard by him, he may state what he *understood* the contract to have been from what he heard them say.<sup>2</sup> In other words, being unable to recollect the precise language used in the conversation overheard, he may testify to the *ideas* thereby conveyed to his mind, and the jury must pass upon the weight of the testimony.<sup>3</sup> But to make a witness' "impression" admissible, it must be shown to be derived from recollection;<sup>4</sup> and there are well-considered adjudications that refuse to allow a witness to state the impression left on his mind by a conversation overheard by him, or his inferences derived therefrom.<sup>5</sup>

Another well-settled rule is that the answer of the witness must be *responsive* to the question put to him; *i.e.*, it must be *direct* and *pertinent* to the question put, or it will be struck out on motion.<sup>6</sup> If the recollection of the witness is

<sup>1</sup> Chambers *v.* Hill, 34 Mich. 523; Pope *v.* Machias & Co., 52 Me. 535; Buchanan *v.* Atchison, 39 Mo. 503; Chaffee *v.* Cox, 1 Hilt. (N. Y.) 78; Kittredge *v.* Russell, 114 Mass. 67.

<sup>2</sup> Eaton *v.* Rice, 8 N. H. 378.

<sup>3</sup> State *v.* Donovan, 61 Iowa, 278; Seymour *v.* Harvey, 11 Conn. 275; Moody *v.* Davis, 10 Ga. 403; Maxwell *v.* Warner, 11 N. H. 568. See also Lockett *v.* Mims, 27 Ga. 207.

<sup>4</sup> Rounds *v.* McCormick, 11 Ill. App. 220.

<sup>5</sup> Crews *v.* Threadgill, 35 Ala. 334.

In Helm *v.* Cantrell (59 Ill. 525) it is held that witnesses should state facts, and not mere inferences or conclusions; and where a witness testifying in respect to the alleged admissions of another is unable to give the words, language, or the substance of it, he should not testify at all; he cannot be permitted to give a mere conclusion of his own, when the conversation or declarations from which the conclusion is drawn have passed from his mind. And in Haywood *v.*

Foster (16 Ohio, 88) it is laid down that a witness, in narrating a conversation held between himself and another, cannot be permitted to testify what he meant by the questions asked by himself; but his meaning must be gathered from the import of his language, without the aid of a subsequent explanation of his own meaning.

<sup>6</sup> Guild *v.* Aller, 2 Harr. (N. J.) 310. The answers of witnesses, if practicable, should amount to mere admissions or denials. Everything additional will be stricken out except such statements of fact as are explanatory of, and "closely linked" with, the questions propounded. McLearn *v.* Succession of Hunsicker, 29 La. Ann. 539. S. P., Ryan *v.* People, 79 N. Y. 593. As to what answers are or are not responsive, within this rule, see Smith *v.* Gaffard, 33 Ala. 168; Rome R. R. Co. *v.* Sullivan, 14 Ga. 277; Streeter *v.* Sawyer, 28 N. H. 555; Shultz *v.* State, 5 Tex. App. 390.



faulty, however, or not absolute and complete, he may, ordinarily, testify to the best of his recollection, or belief; *i.e.*, as he thinks the fact to be.<sup>1</sup> The witness may give the reasons of his belief in such cases,<sup>2</sup> and state why certain facts were impressed upon his memory;<sup>3</sup> but he will not be permitted, under pretence of giving reasons for his recollection, to state facts which are material to the issue, and not admissible by the rules of evidence.<sup>4</sup>

§ 244. **Objections to Questions or Answers.**—If no objection is made to an improper question, or if the specific objection taken is not tenable, the admission of the answer is not error;<sup>5</sup> but the failure of counsel to object to one improper question to which an unsatisfactory answer was given does not preclude him from objecting to a substantial reiteration of the same question.<sup>6</sup> As respects the form of objections, it may be said that they should be specific, rather than general, *i.e.*, should show the ground or grounds of objection; for a general objection to a question is insufficient where, by a statement of the ground of objection, it might be obviated by changing the form of the question.<sup>7</sup>

Objections to questions should be made at the time they are put, or they will generally be regarded as waived;<sup>8</sup> and this rule is particularly applicable where the objection is that the question is leading,<sup>9</sup> in which case the objection must be specific, also.<sup>10</sup> In passing upon this objection the court is

<sup>1</sup> *Rhode v. Louthain*, 8 Blackf. (Ind.) 413; *Swinney v. Booth*, 28 Tex. 113. The "impressions" of a witness, if it is understood that the fact is impressed upon his memory, but that his recollection does not rise to positive assurance, are admissible in evidence for the consideration of the jury; but, if they are not derived from a recollection of the fact, and are so slight that they may have been derived from the information of others, or some unwarrantable deduction of the mind, they are not admissible. *Clark v. Bigelow*, 16 Me. 246; *Humphreus v. Parker*, 52 Me. 502; *State v. Flanders*, 38 N. H. 324.

<sup>2</sup> *Thomas v. State*, 27 Ga. 287; *Cherry v. State*, 68 Ala. 29.

<sup>3</sup> *Bill v. Troy*, 35 Ala. 184.

<sup>4</sup> *McBride v. Cicotte*, 4 Mich. 478.

<sup>5</sup> *Harris v. Panama R. R. Co.*, 5 Bosw. (N. Y.) 312; *State v. Nutting*, 39 Me. 359; *Carter v. Beals*, 44 N. H. 408.

<sup>6</sup> *Sanchez v. People*, 22 N. Y. 147.

<sup>7</sup> *Dunning v. Rankin*, 19 Cal. 640; *State v. Flanders*, 38 N. H. 324; *Tattersall v. Hass*, 1 Hilt. (N. Y.) 56; *Hunt v. Hoboken &c. Co.*, Id. 161. S. P., *Matter of Crosby*, 81 N. Y. 242; *Buttrick v. Gilman*, 22 Wis. 356.

<sup>8</sup> *Goldsmith v. Picard*, 27 Ala. 142; *Scott v. Jester*, 13 Ark. 437; *Sims v. Givan*, 2 Blackf. (Ind.) 461.

<sup>9</sup> *Towns v. Alford*, 2 Ala. 378; *Memphis &c. R. R. Co. v. Bibb*, 1 Ala. Sel. Cas. 630; *Morissey v. People*, 11 Mich. 327; *People v. Lohman*, 2 Barb. (N. Y.) 216; *Pearson v. Fiske*, 2 Hilt. (N. Y.) 146.

<sup>10</sup> *Garborough v. Moss*, 9 Ala. 382.

clothed with considerable discretion, to be exercised in reference to the character of the investigation, the condition and disposition of the witness, and the peculiar circumstances attending the examination.<sup>1</sup> If the objection is overruled, the point decided is that the question is not leading, and an exception will lie;<sup>2</sup> but if the question is prejudicial to the party asking it, the other party cannot object to it as leading.<sup>3</sup>

As to the *effect* of an objection to a question, — its extent, and what is covered by it, — the highest judicial authority in this country has decided that when a question put to a witness is in itself unobjectionable, but the answer goes beyond what is called for, and is improper or incompetent testimony, an objection to the question will not extend to the answer. Special objection must be taken in such a case to the answer,<sup>4</sup> when it will become the duty of the court to exclude so much of the answer as is improper, from the jury.<sup>5</sup> But where several questions pertaining to the same point are asked in immediate succession, and an objection to the first one, which is merely preliminary to the others, is improperly overruled, the objection will not be limited to the first question, but will be deemed to cover the others which sprang naturally from it.<sup>6</sup>

Where an objection to a question cannot be sustained without assuming a fact about which there is a conflict of testimony, the objection is properly overruled.<sup>7</sup> So, also, the objection is not tenable where the witness' answer, whatever it may be, cannot prejudice the objector,<sup>8</sup> or where his answer is legal testimony for the party calling him.<sup>9</sup>

<sup>1</sup> Snyder v. Snyder, 50 Ind. 492.

<sup>2</sup> Steer v. Little, 44 N. H. 613.

<sup>3</sup> Cochran v. Miller, 13 Iowa, 128.

<sup>4</sup> Gould v. Day, 94 U. S. 405. In this case a witness was asked whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands, from the stumps that remained, and he stated in his answer what in his judgment the quantity was. S. P., Barnes v. Ingalls, 39 Ala. 193.

<sup>5</sup> Morgan v. Winston, 2 Swan (Tenn.) 472; Putnam v. Ritchie, 6 Paige (N. Y.) 390.

<sup>6</sup> Barton v. Kane, 17 Wis. 37.

<sup>7</sup> Adams v. Capron, 21 Md. 186.

<sup>8</sup> Matter of Crosby, 81 N. Y. 242.

<sup>9</sup> Miller v. Houcke, 2 Ill. 501. As to objecting to the testimony of one's own witness, see Steinheimer v. Coleman, 39 Ga. 119; Allison v. Hubbell, 17 Ind. 559.

## CHAPTER XIX.

### CROSS-EXAMINATION.

- § 245. Extent of the Right to cross-examine.
- § 246. How far limited by the Direct Examination.
- § 247. How far limited to Relevancy to the Issue.
- § 248. What Questions are Proper.
- § 249. Leading Questions.
- § 250. Sufficiency and Effect of Witness' Answers.
- § 251. Cross-examination of Defendants in Criminal Cases.
- § 252. Cross-examination of Accomplices and Persons jointly indicted.

§ 245. **Extent of the Right to cross-examine.**—(1) *In general.* After the party calling a witness has concluded the examination-in-chief, the opposite party has a right to cross-examine the witness, as a matter of course, and without first obtaining the permission of the court; and a wider latitude of questioning is allowed than upon the direct examination, the object being to correct errors, concealments, and misstatements therein.<sup>1</sup> The cross-examiner is not ordinarily required to disclose what he expects to prove.<sup>2</sup> Where one party is called as a witness by the opposite party, the witness' own counsel may cross-examine him;<sup>3</sup> and if a party who supports his own motion by his affidavit or testimony refuses to be cross-examined, the court may strike out his testimony.<sup>4</sup> But a party is not bound to offer an incompetent witness, in order that his adversary may waive the objection and cross-examine him;<sup>5</sup> or to detain a witness for the convenience of his adversary who fails to claim or reserve the right to cross-examine at the proper time.<sup>6</sup>

Sometimes cross-examination furnishes the only remedy within a party's reach by which to correct the effect of an

<sup>1</sup> See *Anderson v. Russell*, 34 Mich. 109; *Anderson v. Walter*, 34 Mich. 113; *Jacobson v. Metzger*, 35 Mich. 103.

<sup>2</sup> *Martin v. Elden*, 32 Ohio St. 282.

<sup>3</sup> *Teel v. Byrne*, 4 Zab. (N. J.) 631.

<sup>4</sup> *Meyer v. Lent*, 16 Barb. (N. Y.) 538; *Howard v. Chamberlain*, 64 Ga. 684.

<sup>5</sup> *Crowell v. Kirk*, 3 Dev. (N. C.) L. 355.

<sup>6</sup> *Sheffield v. Rochester &c. R. R. Co.*, 21 Barb. (N. Y.) 339.

error—as when a witness testifies to acts which did not happen in his presence: in such a case his testimony cannot be stricken out: the only remedy is to show, by cross-examination, that the witness had not sufficient opportunity of knowing what he testified.<sup>1</sup>

Where several attorneys are employed on the same side, there is no rule requiring any particular one of them to conduct the cross-examination, or that requires the same attorney who took part in the examination-in-chief to conduct the cross-examination.<sup>2</sup>

(2) *Effect of death of witness after direct, but before cross-examination.* The death of a witness after his examination-in-chief, but before an opportunity had been afforded to cross-examine him, has been held to render his testimony-in-chief inadmissible.<sup>3</sup> While this is the rule in actions of a legal nature, in equity, the inadmissibility of the direct testimony of such a witness is a question confided to the discretion of the court, in view of all the circumstances of the case.<sup>4</sup>

(3) *Discretionary powers of the court.* It is a rule of very general application, that the extent to which a witness may be cross-examined is ordinarily a matter of discretion with the presiding judge, to which no exception lies.<sup>5</sup> There is no uniform rule governing the matter, greater liberties being allowed when the witness shows partisanship than when he evinces impartiality; and it requires a strong case to justify a reversal for the allowance of too much latitude on the part of the cross-examiner.<sup>6</sup> This discretion particularly extends to the range of a cross-examination in disparagement of the character of a witness;<sup>7</sup> and this, without putting the witness to his claim of privilege.<sup>8</sup> The court may postpone the

<sup>1</sup> Rushmore v. Hall, 12 Abb. (N. Y.) Pr. 420.

<sup>2</sup> Olive v. State, 11 Neb. 1.

<sup>3</sup> Kissam v. Forrest, 25 Wend. (N. Y.) 651; Sperry v. Moore, 42 Mich. 353.

<sup>4</sup> Gass v. Stinson, 3 Sumn. (U. S.) 104-108; 1 Greenl. Ev. (14 Ed.) § 554, and cases there cited.

<sup>5</sup> Commonwealth v. Lyden, 113 Mass. 452; Knight v. Cunningham, 13 N. Y. Supreme Court, 100; Wal-

lace v. Taunton Street R. R. Co., 119 Mass. 91; Brumagim v. Bradshaw, 39 Cal. 24, 38; Thornton v. Hook, 36 Cal. 223; Stewart v. People, 23 Mich. 63; Arnold v. Nye, Id. 286.

<sup>6</sup> Ingram v. State, 67 Ala. 67.

<sup>7</sup> Gutterson v. Morse, 58 N. H. 165.

<sup>8</sup> Gt. Western &c. Co. v. Loomis, 32 N. Y. 127. Thus it is within the discretion of the court to permit counsel, on cross-examination, to ask a

cross-examination to a subsequent stage of the cause,<sup>1</sup> or permit a party after resting his case to cross-examine his adversary's witnesses, or call others.<sup>2</sup> Where a witness has betrayed bias, partiality, or corruption, this discretionary power will be exercised in extending the latitude of the questioner, and a most searching cross-examination will be allowed.<sup>3</sup>

§ 246. **How far limited by the Direct Examination.**—A preliminary question frequently arises as to whether the witness has so far given testimony-in-chief as to entitle the opposite party to cross-examine him. If he is merely called to produce a paper which is to be proved by another witness, he need not be sworn, and if not sworn, he cannot be cross-examined.<sup>4</sup> If, however, the witness is sworn and is competent, the rule in England is, that the adverse party has the right to cross-examine him, even though the party calling him does not see fit to examine him in chief;<sup>5</sup> unless he is sworn by mistake, and the mistake is discovered before any questions are put to him;<sup>6</sup> or unless his direct examination is stopped by the court after an immaterial question has been put to him.<sup>7</sup>

So, if a witness called merely to prove the execution of a written instrument is sworn and examined to that extent only,—however formal and brief his testimony may be,—this, in some jurisdictions, makes him a witness for all purposes, and he may be cross-examined on the whole case,<sup>8</sup> while

witness whether he has not sworn falsely in a particular suit, or on some occasion, but not whether third persons have accused him of swearing falsely. *Hannah v. McKellip*, 49 Barb. (N. Y.) 342. But see *Elliott v. Boyles*, 31 Pa. St. 65.

<sup>1</sup> *Campan v. Dewey*, 9 Mich. 381.

<sup>2</sup> *Young v. Bennett*, 5 Ill. 43.

<sup>3</sup> *People v. Long*, 50 Mich. 249; *Re Carmichael*, 36 Ala. 514; *Floyd v. Wallace*, 31 Ga. 688. See also *State v. Adams*, 14 La. Ann. 620.

<sup>4</sup> *Davis v. Dale*, Moo. & M. 515; *Perry v. Gibson*, 1 Ad. & E. 48; *Summers v. Moseley*, 2 Car. & M. 477; *Rush v. Smith*, 1 Crompt. M. & R. 94; *Read v. James*, 1 Stark. 132; *R. v. Murlis*, Moo. & M. 515; *Simpson v. Smith*, Nott. Summ. Ass. 1822, MS.

<sup>5</sup> *Rex v. Brooke*, 2 Stark. 472; *Phillips v. Eamer*, 1 Esp. 357; *Dickinson v. Shee*, 4 Esp. 67; Reg. v. *Murphy*, 1 Armst. M. & O. 204; *Morgan v. Bridges*, 2 Stark. 314. *Contra*, see *Austin v. State*, 14 Ark. 555.

<sup>6</sup> *Clifford v. Hunter*, 3 Car. & P. 16; *Rush v. Smith*, 1 Crompt. M. & R. 94; *Wood v. Mackinson*, 2 Man. & P. 273.

<sup>7</sup> *Creevy v. Carr*, 7 Car. & P. 64.

<sup>8</sup> *Morgan v. Bridges*, 2 Stark. 314; *Dawson v. Callaway*, 18 Ga. 573; *Lunday v. Thomas*, 26 Ga. 537; *Aiken v. Cato*, 23 Ga. 154; *Blackington v. Johnson*, 126 Mass. 21; *Bulen v. Granger* (*Mich.*) 25 N. W. Rep. 188; *Lamprey v. Munch*, 21 Minn. 379; *Page v. Kunkey*, 6 Mo. 433; *Brown v. Burrus*, 8 Mo. 26; *Butterworth v.*

in other jurisdictions the contrary doctrine obtains.<sup>1</sup> In this country, the weight of authority undoubtedly is, that the right to cross-examine a witness is limited to matters stated by him in his direct examination;<sup>2</sup> or as the rule has been well expressed, a witness cannot upon cross-examination be questioned with regard to a matter which does not tend to impeach, rebut, explain, modify, or in any manner qualify anything he has testified to on his examination-in-chief.<sup>3</sup> But the cross-examination ought to be allowed a free range if kept within the subject-matter of the direct testimony of the witness,<sup>4</sup> especially where the witness is a party, or unwilling.<sup>5</sup> Thus, it has been frequently held that where a witness has testified, on the direct, to a part of a conversation, the cross-examiner may require him to state the whole of it;<sup>6</sup> so, where a witness has testified, on the direct, to a part of another witness' testimony in a former trial, the cross-

Pecare, 8 Bosw. (N. Y.) 671; Linsley v. Lovely, 26 Vt. 123. See also Moody v. Rowell, 17 Pick. (Mass.) 490, 498; Beal v. Nichols, 2 Gray (Mass.) 262; Jackson v. Varick, 7 Cow. (N. Y.) 238; Fulton Bank v. Stafford, 2 Wend. (N. Y.) 483; Dutton v. Woodman, 9 Cush. (Mass.) 255; Wentworth v. Crawford, 11 Tex. 127.

<sup>1</sup> Harrison v. Rowan, 3 Wash. (U. S.) 580; McFadden v. Mitchell, 61 Cal. 148; Ellmaker v. Buckley, 16 S. & R. (Pa.) 77; Farmer's Bank v. Strohecker, 9 Watts (Pa.) 237. S. P., Gale v. People, 26 Mich. 157; Wilson v. Wagar, Id. 452; Haynes v. Ledyard, 33 Id. 319; Buckley v. Buckley, 12 Nev. 423; Fulton v. Central Bank, 92 Pa. St. 112; Monongahela Water Co. v. Stewartson, 96 Id. 436.

<sup>2</sup> Houghton v. Jones, 1 Wall. (U. S.) 702; Bell v. Chambers, 38 Ala. 600; Bell v. Prewitt, 62 Ill. 362; Lloyd v. Thompson, 5 Ill. App. 90; Aurora v. Cobb, 21 Ind. 492; Landsberger v. Gorham, 5 Cal. 450; Cokely v. State, 4 Iowa, 477; People v. Horton, 4 Mich. 67; Aitken v. Mendenhall, 25 Cal. 212; Congar v. Galena & c. R. R. Co., 17 Wis. 477; People v. Miller, 33 Cal. 99; Chicago & c. R. R. Co. v. Northern & c. R. R. Co., 36 Ill.

60; Wilhelmi v. Leonard, 13 Iowa, 330; Leavitt v. Stansell, 44 Mich. 424; Donnelly v. State, 2 Dutch. (N. J.) 463, 601; Hartness v. Boyd, 5 Wend. (N. Y.) 563; Greateon v. Smith, 1 Daly (N. Y.) 380; Campan v. Dewey, 9 Mich. 381; Beaulieu v. Parsons, 2 Minn. 37; Castor v. Bavington, 2 Watts & S. (Pa.) 505; Rucker v. Eddings, 7 Mo. 115; Floyd v. Bovard, 6 Watts & S. (Pa.) 75; Helser v. McGrath, 52 Pa. St. 531.

<sup>3</sup> Sumner v. Blair, 9 Kan. 521. S. P., Da Lee v. Blackburn, 11 Kan. 190; Phillips v. Elwell, 14 Ohio St. 240; Haynes v. Ledyard, 33 Mich. 319.

<sup>4</sup> Buckley v. Buckley, 12 Nev. 423. Compare O'Hagan v. Dillon, 42 N. Y. Superior, 456; Baird v. Daly, 68 N. Y. 547. See also Ferguson v. Rutherford, 7 Nev. 385.

<sup>5</sup> Hanchett v. Kimbark (*Ill.*) 7 N. East. Rep. 491; Cramer v. Cullinane, 2 MacArth. (D. C.) 197; Pryor v. Harris, 30 Ala. 118.

<sup>6</sup> People v. Strong, 30 Cal. 151; People v. Smallman, 55 Cal. 185; Phares v. Barber, 61 Ill. 271; Metzger v. State, 30 Ind. 596; Shackelford v. State, 43 Tex. 138. Compare Perlmuter v. Highland Street Railway Co., 121 Mass. 497.

examiner may call out the whole of such testimony;<sup>1</sup> or where a question put on the direct was not fully answered, a full answer may be elicited on the cross.<sup>2</sup>

The better opinion seems to be that, if it be desired to examine a witness upon matters other than those drawn out upon his direct examination, the party must make the witness his own, and call him as such.<sup>3</sup>

But here, as elsewhere, the want of uniformity in legal rules is plainly apparent; for several courts of last resort and high respectability, maintain a doctrine directly the converse of that we have just been considering; they hold that on cross-examination the witness may be inquired of as to all subjects pertinent to the case, whether touched upon in the examination-in-chief, or not;<sup>4</sup> and that to restrict the cross-examiner to the matters brought out on the direct examination is reversible error,<sup>5</sup> especially where the object of the cross-examination is to test the credibility of the witness.<sup>6</sup>

§ 247. **How far limited to Relevancy to the Issue.** — The subject of the admissibility of questions as to impertinent, immaterial, and collateral matters on the cross-examination of a witness, has been already pretty fully discussed when we were considering the rules relative to impeachment,<sup>7</sup> and little more remains to be said here upon the topic, as more

<sup>1</sup> *Aulger v. Smith*, 34 Ill. 534; *Harness v. State*, 57 Ind. 1.

<sup>2</sup> *Mason v. Tallman*, 34 Me. 472.

<sup>3</sup> *Boggs v. Thompson*, 13 Neb. 403; *Philadelphia R. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448; *State v. Smith*, 49 Conn. 376; *Brown v. State*, 28 Ga. 199; *Stevens v. Brown*, 12 Ill. App. 619; *Patton v. Hamilton*, 12 Ind. 256; *Dearmond v. Dearmond*, Id. 455.

<sup>4</sup> *State v. Sayers*, 58 Mo. 585; *Fralick v. Presley*, 29 Ala. 457; *White v. Dinkins*, 19 Ga. 285; *Barker v. Blount*, 63 Ga. 423; *Mask v. State*, 32 Miss. 405; *Fulton Bank v. Stafford*, 2 Wend. (N. Y.) 483; *Livingston v. Keech*, 34 N. Y. Superior Court, 547; *Kibler v. McIlwain*, 16 So. Car. 550.

<sup>5</sup> *State v. Thomas*, 32 La. Ann. 349.

<sup>6</sup> *State v. Willingham*, 33 La. Ann. 537; *State v. Gregory*, Id. 737; *King v. Atkins*, Id. 1057.

For further illustrations of more or less radical departures from the rule limiting the cross-examination to matters gone into on the direct, see *Thornburgh v. Hand*, 7 Cal. 554; *Fredd v. Eves*, 4 Harr. (Del.) 385; *Quimby v. Morrill*, 47 Me. 470; *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Webster v. Lee*, 5 Mass. 334; *Thayer v. Barney*, 12 Minn. 502; *Squire v. Wright*, 1 Mo. App. 172; *Jackson v. Varick*, 7 Cow. (N. Y.) 238; *Markley v. Swartzlander*, 8 Watts & S. (Pa.) 172; *Rhodes v. Commonwealth*, 48 Pa. St. 396; *Henderson v. Hydraulic Works*, 9 Phil. (Pa.) 100; *Jackson v. Inabinit*, Riley (S. C.) Ch. 9; *State v. Cardoza*, 11 S. C. 195.

<sup>7</sup> *Supra*, Chap. XIII., more particularly § 209.

latitude is allowed in this respect where the object of the cross-examiner is to impeach or discredit the witness, than where he goes into matters outside the issue for any other purpose; the rule being a stringent one that a witness cannot be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matters in issue, and which would in no way affect his credit;<sup>1</sup> and still less can he be examined as to such facts for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony.<sup>2</sup> If the witness answer such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter.<sup>3</sup> The only point to be considered therefore, is, what matters are and what are not relevant to the issue, and this also has been sufficiently discussed.<sup>4</sup>

§ 248. **What Questions are Proper.** — In applying the foregoing principles the courts have frequently held that a witness might properly be asked, on cross-examination, as to the *intent* or *purpose* with which an *act* or *statement* material to the issue, was done or made: *e.g.*, whether an assignment claimed to have been fraudulent was made with fraudulent intent;<sup>5</sup> or, for what purpose the witness went to a place, which, in his direct testimony, he says he visited;<sup>6</sup> or what reason he gave for refusing to pay money;<sup>7</sup> or what is his state of feeling towards the parties;<sup>8</sup> or whether he was not

<sup>1</sup> See *R. v. Collins*, 9 Car. & P. 456.

<sup>2</sup> *Spenceley v. DeWillott*, 7 East, 108.

<sup>3</sup> *Harris v. Tippet*, 2 Campb. 637; *Carpenter v. Ward*, 30 N. Y. 243; *Attorney-General v. Hitchcock*, 1 Mees. H. & G. 91; *Shields v. Cunningham*, 1 Blackf. (Ind.) 86; *McIntire v. Young*, 6 Id. 496; *Dozier v. Doyce*, 8 Port. (Ala.) 303; *United States v. Dickinson*, 2 McLean (U. S.) 325. If a party choose to cross-examine a witness as to an irrelevant and collateral fact, the answers of the witness are conclusive upon him. *Lawrence v. Baker*, 5 Wend. (N. Y.) 301; *Harris v. Wilson*, 7 Id. 57; 4 Denio. 502; 6 Duer, 587.

<sup>4</sup> *Supra*, § 209, subds. 2 and 3.

<sup>5</sup> *Persse, &c. Paper Works v. Willett*, 1 Robt. (N. Y.) 131; *Persse, &c. Works v. Willett*, 19 Abb. (N. Y.) Pr. 416. S. P., *Vawter v. Ohio &c. R. R. Co.*, 14 Ind. 174.

<sup>6</sup> *Thomason v. Dill*, 30 Ala. 444; *Dance v. McBride*, 43 Iowa, 624; *State v. Hartnell*, 75 Mo. 251.

<sup>7</sup> *Bennett v. Burch*, 1 Den. (N. Y.) 141.

<sup>8</sup> *Ray v. Bell*, 24 Ill. 444; *Bullard v. Lambert*, 40 Ala. 204; *Blessing v. Hope*, 8 Md. 31. But not towards another witness. *State v. Alford*, 31 Conn. 40. "Don't you love the defendant?" was disallowed. *Blunt v. State*, 9 Tex. App. 234. So was "Do your neighbors call you lying Josh?" *Hersom v. Henderson*, 23 N. H. 498.



intoxicated at the time he refers to;<sup>1</sup> or in the constant habit of making mistakes;<sup>2</sup> or upon what basis he makes an estimate of value or quantity.<sup>3</sup> So, also, he may be interrogated as to his interest in the controversy before the court, or in its result;<sup>4</sup> or as to the full particulars of a transaction concerning which he has testified.<sup>5</sup> He may be asked whether he has had any private conversation with the counsel of the party calling him;<sup>6</sup> or whether he employed the counsel who assists the district attorney in a criminal case.<sup>7</sup> Even questions, the answers to which may possibly involve matter of law, are sometimes admissible on cross-examination: *e.g.*, whether the witness "had ever authorized any one to waive his discharge under the insolvent laws, or the bar of the statute of limitations."<sup>8</sup>

But the very nature of the subject renders it inexhaustible, and a further reference to the great multitude of decisions, where the admissibility of particular inquiries has been passed upon, would unduly swell the size of this work. The object of cross-examination is to elicit the whole truth of transactions supposed to have been partially explained; and any questions tending to fill up designed or accidental omissions of the witness,<sup>9</sup> or to draw out a fact which may be rendered material by further evidence,<sup>10</sup> are admissible and proper.<sup>11</sup>

§ 249. **Leading Questions.**—The rule against leading questions<sup>12</sup> has much less application to the cross-examination than it has to the direct. Indeed, almost every cross-exam-

<sup>1</sup> *Pool v. Pool*, 33 Ala. 145. Compare *Batten v. State*, 80 Ind. 394.

<sup>2</sup> *Mechanics Bank v. Smith*, 19 Johns. (N. Y.) 115.

<sup>3</sup> *United States v. Flowery*, 1 Sprague (U. S.) 109; *Atchison & Co. R. R. Co. v. Blackshire*, 10 Kan. 477.

<sup>4</sup> *Vaughan v. Weslover*, 4 Thomp. & C. (N. Y.) 316; *Suit v. Bonnell*, 33 Wis. 180. See *People v. Christie*, 2 Abb. (N. Y.) Pr. 256.

<sup>5</sup> *Oldershaw v. Knowles*, 101 Ill. 117. See also *Stanton County v. Canfield*, 10 Neb. 387.

<sup>6</sup> *Forney v. Ferrell*, 4 W. Va. 729; though the court rightly deems it a breach of professional ethics to ask such a question.

<sup>7</sup> *People v. Blackwell*, 27 Cal. 65.

<sup>8</sup> *Morris v. Hazlehurst*, 30 Md. 362. Compare *Monongahela Water Co. v. Stewartson*, 96 Pa. St. 436; *Marshall v. Morrissey*, 6 Ill. 542.

<sup>9</sup> *Chandler v. Allison*, 10 Mich. 460.

<sup>10</sup> *O'Donnell v. Segar*, 25 Mich. 367.

<sup>11</sup> Hearsay evidence, however, — what the witness heard others say — is generally as objectionable on the cross, as on the direct examination. *Dudley v. Elkins*, 39 N. H. 78; *Ashley v. Wolcott*, 3 Gray (Mass.) 571; *Carlton v. Pierce*, 1 Allen (Mass.) 26; *Adams v. Brown*, 16 Ohio St. 75; *Browne v. Molliston*, 3 Whart. (Pa.) 129.

<sup>12</sup> *Supra*, §§ 240-242.

ination of a witness is made up, for the most part, of leading questions.<sup>1</sup> The witness may be led directly to the point on which his answer is required.<sup>2</sup> If he betrays a zeal against the cross-examining party, or shows an unwillingness to speak fairly and impartially, he may be questioned with minuteness as to particular facts, or even particular expressions. There can be no danger in leading too much, where the witness is obstinately determined not to follow.

On the other hand, instances frequently occur where the witness is adverse to the party who calls him, and leans strongly to the other side; here there must be some restrictions as to the form and manner of cross-examining. It often happens that a witness, in cross-examination, waits only for a hint to shape a favorable answer, and is in effect the witness of the cross-examining party, though technically called the witness of the opposite side. To put strong leading questions to such a witness, without limitation or reserve, is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial.<sup>3</sup>

Another point of some difficulty is, as to whether, when a party is once entitled to cross-examine, this right continues throughout the trial of the cause, so that in case he should afterwards recall the same witness to prove a part of his own case, he may put leading questions to him, treating him as the witness of the party first calling him. As to this there is some difference of judicial opinion, the prevailing idea being, that the trial court has a discretion in such cases to prevent injustice by the abuse of the right to cross-examine.<sup>4</sup> It is pretty well settled, however, that a party who has not opened his own case will not be permitted to introduce it to the jury by cross-examining the other party's witnesses;<sup>5</sup> although after he has opened his case, he may recall them for that purpose.<sup>6</sup> If he seeks to elicit new matter constituting an element of his case, upon cross-examination, he has not the right to put leading questions; as to such new matter the

<sup>1</sup> *Harrison v. Rowan*, 3 Wash. Pick. (Mass.) 498; *Wallace v. Taunton Street Railway*, 119 Mass. 91. (U. S.) 580.

<sup>2</sup> See *Hardy's Case*, 24 How. St. Tr. 755.

<sup>3</sup> 2 Phill. Ev. \* 907.

<sup>4</sup> 1 Greenl. Ev. [14 Ed.] § 447; 1 Stark, Ev. 162; *Moody v. Rowell*, 17

<sup>5</sup> 1 Stark, Ev. 164; *Ellmaker v. Bulkley*, 16 S. & R. (Pa.) 77.

<sup>6</sup> See *Burke v. Miller*, 7 Cush. (Mass.) 547, 550.

witness becomes his own;<sup>1</sup> nor can he put words in the witness' mouth, nor assume, by his questions, that there is evidence of a fact when there is none.<sup>2</sup> But the court may, in its discretion, permit leading questions to be put, although relating to matters not inquired of upon the direct examination.<sup>3</sup>

§ 250. **Sufficiency and Effect of Witness' Answers.** — Ordinarily speaking, the answers of the witness on a legitimate cross-examination must be deemed to be part of the evidence given in chief; *i.e.*, the witness still remains the witness of the party calling him, and does not become the witness of the cross-examining party, who is not bound by his answers, but is at liberty to contradict them by other evidence.<sup>4</sup> But matters elicited on cross-examination, which are only admissible to weaken the force of the testimony-in-chief, ought not to go to the jury for a different purpose.<sup>5</sup>

If, however, the cross-examiner asks a question, a responsive answer to which operates against his side of the issue, he cannot get rid of the effect by objecting to the competency of the witness,<sup>6</sup> or the admissibility of the evidence.<sup>7</sup>

<sup>1</sup> *People, ex rel. Phelps v. Oyer and Terminer*, 83 N. Y. 436.

<sup>2</sup> *Levi v. State*, 14 Neb. 1.

<sup>3</sup> *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Legg v. Drake*, 1 Ohio St. 286. See also *Livingston v. Keech*, 34 N. Y. Superior Court, 547.

<sup>4</sup> *Horner v. Speed*, 2 Patt. & H. (Va.) 616; *Gregory v. Nesbit*, 5 Dana (Ky.) 419; *Newberry v. Furnival*, 40 How. (N. Y.) Pr. 139; *State v. Langdon*, 17 N. W. Rep. (Minn.) 859.

An erroneous notion prevails, as to the question on whose part the evidence given on cross-examination is to be considered as introduced. It is not unusual to find in bills of exceptions, a statement of the evidence drawn out on the cross-examination, as evidence introduced by the party making the cross-examination, "tending to prove" his case. This statement is always incorrect when used with reference to a legitimate cross-examination. All testimony elicited on such cross-examination, consisting, as it does, of facts which, though relating to the direct examination, may

have been omitted or concealed in that examination, or facts tending to contradict, explain or modify such facts, or to rebut or modify some inference which might otherwise be drawn from them, must in the nature of things constitute a part of the evidence given in chief; and both alike and together must, therefore, be treated as evidence given on the part of the party calling the witness. The evidence given by the witness is not that alone given in chief, but it is that given in chief, as contradicted, explained, enlarged, narrowed or modified by the cross-examination. It is simply the combined result of both. *Wilson v. Wagar*, 26 Mich. 452.

<sup>5</sup> *Luther v. Skeen*, 8 Jones (N. C.) L. 356.

<sup>6</sup> *Bailey v. Cooper*, 5 Humph. (Tenn.) 100.

<sup>7</sup> *Boteler v. Beall*, 7 Gill & J. (Md.) 389; *Kelley v. Merrill*, 14 Me. 228; *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147. See also *Monk v. Union, &c. Ins. Co.*, 6 Robt. (N. Y.) 455.

In *Printup v. Mitchell* (17 Ga.

### § 251. Cross-examination of Defendants in Criminal Cases.

— In general it may be said that the accused in taking the stand has voluntarily changed his *status* from defendant to witness, and consequently may be treated like any other; be cross-examined within the usual boundaries; be discredited, contradicted and impeached.<sup>1</sup> There are, however, limitations upon this doctrine necessary to be understood before one can reach a rightful appreciation of the subject.

These are usually confined to the line opened up by the direct,<sup>2</sup> with such deflections as may be necessary to bring the entire matter trenched upon by the direct before the court; that is, to extract the whole truth concerning the facts brought forward by him. An apparent exception is found in the admissibility of questions tending to *discredit* his veracity as a witness; of course, it naturally follows that successful efforts of that nature operate materially against him as the accused, but having voluntarily placed himself in the witness-box, he must abide the consequences. Where a defendant undertakes, upon his direct examination, to state all that transpired between two points of time, he may be asked upon the cross whether he has omitted anything pertinent to the case, and, if necessary, his attention may be directed to the precise point by asking him if some specified thing did not occur.<sup>3</sup> In the discretion of the court he may be recalled for further cross-examination,<sup>4</sup> even though it be for the purpose of impeaching his testimony, if the further cross-examination relate to the same matters as were referred to in his direct examination.<sup>5</sup> But whether the trial judge

558), it is held that a witness, on his cross-examination, may answer by referring to his previous answers to the direct questions; while in *Union Bank v. Torrey* (5 Duer (N. Y.) 626) precisely the contrary doctrine is laid down.

If the witness' answers are not full, but yet substantial, they will not be stricken out (*Walker v. Walker*, 14 Ga. 242); but if it appears on the cross-examination that the witness has not the moral sense requisite to make him a competent witness, the court may, in its discretion, strike out his testimony, or leave it to the jury with proper instructions as to its due

weight. *People v. Harper*, 1 Edm. (N. Y.) Sel. Cas. 180.

<sup>1</sup> *McKeone v. People*, 6 Cal. 346; *State v. Owen*, 78 Mo. 367; *State v. Red*, 53 Iowa, 69; *State v. Witham*, 72 Me. 531; *Territory (Ariz.) v. Davis*, 10 Pac. Rep. 359; *Thomas v. State (Ind.)* 7 Cr. L. Mag. 50.

<sup>2</sup> *State v. Porter*, 75 Mo. 171; *State v. McLaughlin*, 76 Mo. 320; *State v. Turner*, Id. 350.

<sup>3</sup> *People v. Russell*, 46 Cal. 121; *People v. Wallin*, 22 N. W. Rep. 15; *Greenly v. State*, 60 Ind. 141.

<sup>4</sup> *State v. Cohn*, 9 Nev. 179.

<sup>5</sup> *State v. Horne*, 9 Kan. 119.

has a discretion to permit the cross-examiner to probe the witness as to previous prosecutions against him, in no way connected with the case on trial, is a point upon which the adjudged cases are in conflict.<sup>1</sup> The supreme court of California has well said that the mere fact that the defendant in a criminal prosecution offers himself as a witness in his own behalf, does not change or modify the rules of practice with reference to the proper limits of a cross-examination, and does not make him a witness for the state against himself.<sup>2</sup>

<sup>1</sup> That such questions may be put, see *People v. Gale*, 50 Mich. 237; *People v. Hovey*, 29 Hun (N. Y.) 382.

In *People v. Brown* (72 N. Y. 571), the question asked on cross-examination was, "How many times have you been arrested?" *Quære*, whether the evidence was competent as bearing upon the credibility of the witness. This same court went a step further in *People v. Crapo* (76 N. Y. 288), and distinctly held that the question put to the accused, when testifying upon his trial for burglary and larceny, "Were you also, in 1869, along in February or March, arrested on a charge of bigamy?" was incompetent, and did not legitimately tend to impair the credibility of the witness; and Chief Justice Church, in his opinion, says: "Although the witness did not claim the privilege, the question was incompetent. It did not legitimately tend to impair the credibility of the prisoner as a witness, and was not competent for any purpose. The discretion which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility, should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offence not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and, in addition to this, he may be subjected to a cross-examination upon every in-

cident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life."

In *People v. Johnson* (7 Pac. C. L. J. 168), the defendant was asked on cross-examination if he had been previously convicted of a felony, and compelled, against his will, to answer. It was held that the question was proper as going to his credibility as a witness; the court saying that *People v. Brown*, *supra*, is not in conflict. But in *People v. Iams* (57 Cal. 115), a defendant in an indictment for murder, was asked whether any criminal intimacy had existed between himself and the wife of the deceased. And the question was held to be immaterial.

<sup>2</sup> *People v. McGungill*, 41 Cal. 429. This subject of self-criminating testimony, or the privilege to refuse to answer, will be found treated *infra*, Chap. XXII.; and the consequence of defendant's failure to become a witness, or refusal to answer questions put to him on cross-examination, are pointed out, *supra*, Chap. IX.

§ 252. **Cross-examination of Accomplices and Persons jointly indicted.**— Little need be said upon this matter, other than what this chapter already contains, which is equally applicable to the witnesses now under consideration, except that the latitude of cross-examination is especially extended where the witness is an accomplice, in allowing questions having a tendency to shake his credit by injuring his character, or to prove his accuracy or veracity; and in such matters much is left to the enlightened discretion of the court trying the cause, and its action will not be reviewed, unless such discretion appears manifestly to have been abused.<sup>1</sup> Thus, one who turns state's evidence against his alleged associates in crime, under an assurance that his disclosures are not to be used against him, may be cross-examined as to what he told counsel about the offence, while he was himself charged.<sup>2</sup> So also the defendant may show on the cross-examination of such a witness, that he had been offered money, and property, and immunity from punishment, if he would testify as he finally testified on behalf of the state; the fact that the offer was made by one having no authority to make it going to the weight and not the competency of the evidence.<sup>3</sup>

<sup>1</sup> Marler v. State, 68 Ala. 580.      <sup>2</sup> State v. Condry, 5 Jones (N. C.) S. P., Lee v. State, 21 Ohio St. 151. L. 418.

<sup>3</sup> Tullis v. State, 4 Ohio L. J. 12.

## CHAPTER XX.

### RE-EXAMINATION, REBUTTAL AND SURREBUTTAL, RECALLING AND RE-EXAMINING.

§ 253. Re-direct Examination.

§ 254. Re-cross-examination.

§ 255. Examination in Rebuttal, or Surrebuttal.

§ 256. Recalling and Re-examining Witnesses.

§ 253. **Re-direct Examination.** — The conduct and extent of the re-direct examination (which follows, and is intended to neutralize the effect of the cross-examination) is left very much to the sound discretion of the presiding judge, subject to the general rule that it shall not extend to any new matter unconnected with the cross-examination, and which might have been gone into on the direct examination.<sup>1</sup> If the re-examiner wishes to elicit new matter from the witness, he must obtain the permission of the court; and if that permission be refused, he has no ground of exception.<sup>2</sup> But if the cross-examiner draws out new matter not inquired about in the examination-in-chief, he makes the witness his own for that purpose, and the opposite party may cross-examine on such new matter;<sup>3</sup> always provided it be material, for a witness cannot be examined directly as to irrelevant matters, though he has been questioned as to them on the previous cross-examination.<sup>4</sup> And it is held that where a witness is examined by both parties respecting a matter irrelevant to the issue, without objection, one party cannot afterwards ob-

<sup>1</sup> *The Queen's Case*, 2 Brod. & B. 297; *Prince v. Samo*, 7 Ad. & E. 627; *Donnelly v. State*, 2 Dutch (N. J.) 463, 601; *Dutton v. Woodman*, 9 Cush. (Mass.) 255; *State v. Denis*, 19 La. Ann. 119; *Beal v. Nichols*, 2 Gray (Mass.) 262; *Commonwealth v. Wilson*, 1 Id. 337; *Covanhoven v. Hart*, 21 Pa. St. 495; *Richardson v. Wilkins*, 19 Barb. (N. Y.) 510.

<sup>2</sup> *Beal v. Nichols*, 2 Gray (Mass.)

262. See also *Schaser v. State*, 36 Wis. 429.

<sup>3</sup> *Bassham v. State*, 38 Tex. 622. Compare *Farmer's & Co. Bank v. Young*, 36 Iowa, 45. See also *Goodman v. Kennedy*, 10 Neb. 270.

<sup>4</sup> *Smith v. Dreer*, 3 Whart. (Pa.) 154. But see to the contrary, *State v. Witham*, 72 Me. 531; *Mowry v. Smith*, 9 Allen (Mass.) 67; *Furbush v. Goodwin*, 5 Fost. (N. H.) 425.

ject to the witness' further examination on the same subject.<sup>1</sup> Thus, where collateral facts were called out in the cross-examination of a witness, tending to create distrust of his integrity, fidelity, or truth, it was held competent for the adverse party to ask of the witness an explanation which might show the consistency of such facts with his integrity, fidelity, and truth, although circumstances might thus be proved which were foreign to the principal issue, and which, but for such previous cross-examination, would not have been permitted to be proved.<sup>2</sup> Again, a party bringing out, on cross-examination, the fact of the existence of a certain instrument, cannot complain of the production of the instrument on the re-direct examination.<sup>3</sup>

The principal seeming departure from the strict rule, arises in cases where a part of a conversation between the witness and a third person is drawn out on the cross-examination. In such cases, the better opinion seems to be that the re-examiner may demand of the witness all that was said at that conversation, *pertaining to the same subject-matter of inquiry*.<sup>4</sup> But if the conversation, a part of which is thus detailed on the cross-examination without objection, is a mere hearsay story, this will not authorize the calling out of the rest of it, against objection, on the re-direct examination, upon the claim that it is part of the same conversation.<sup>5</sup>

<sup>1</sup> Young v. Mason, 8 Pick. (Mass.) 551.

<sup>2</sup> United States v. Barrels of High Wines, 8 Blatchf. (U. S.) 475.

<sup>3</sup> Fillmore v. Union Pacific R. R. Co., 2 Wyom. T. 94.

<sup>4</sup> Roberts v. Roberts, 85 N. C. 9. That this is really *within* the rule stated at the beginning of this section of the text, will appear by the clause printed in italics. To illustrate:—

Where the defendant, on cross-examination, inquired of a witness what a third person told him, it was held, that this did not authorize the plaintiff, upon a re-examination, to ask the witness what the third person, in the same conversation, said the defendant himself had told him. McCracken v. West, 17 Ohio, 10.

Where a witness, on cross-examination, was asked if the party whose

witness he was, had spoken to him on the subject of the suit, and he answered that he had, the party calling him, on re-examination, was allowed to ask what he had said to the witness. Somerville &c. R. R. Co. v. Doughty, 2 Zab. (N. J.) 495.

Where a witness is introduced by a party, and is asked as to a particular fact, and the opposite party, on cross-examination, asks him generally if he ever communicated that fact to any one, and to whom, and he answers that he communicated it to the party calling him, this does not entitle the party calling him to inquire as to his own reply and other conversation, at the time. Winchell v. Latham, 6 Cow. (N. Y.) 682. See also People v. Beach, 87 N. Y. 508; Walsh v. Porterfield, 87 Pa. St. 376.

<sup>5</sup> Wagner v. People, 30 Mich. 334.



The counsel conducting the re-direct examination, may always ask such questions as may be proper to elicit an explanation of the true sense and meaning of the expressions used by the witness on the cross-examination; and the motive by which the witness was induced to use those expressions.<sup>1</sup> So he may be questioned with a view to correct his testimony on the cross-examination.<sup>2</sup>

§ 254. **Re-cross-examination.**—This is no more than a further continuance of the original cross-examination, addressed more particularly to the matter brought out on the re-direct. Its allowance is a matter of discretion with the presiding judge, it not being demandable as a matter of right;<sup>3</sup> and no exception lies to a ruling which excludes the further cross-examination of a witness, whose direct and cross-examination have several times been taken up and dropped.<sup>4</sup> Thus, where a witness has returned to the stand to correct his testimony upon a single point, there is no error in refusing to permit him to be re-cross-examined, except on that point. The matter is entirely within the discretion of the court below.<sup>5</sup> But it has been held that where, on the re-examination-in-chief of a witness, new matter is brought out, which is neither explanatory of the first, nor in rebuttal of the cross-examination, the opposite party have the right to cross-examine again as to such new matter.<sup>6</sup>

§ 255. **Examination in Rebuttal or Surrebuttal.**—The general rule is, that each party must introduce all the evidence upon which he relies to establish his side of the case, before he rests; then after his adversary closes his evidence, he may give proof in reply or rebuttal. But whether evidence may be given in rebuttal which should and could properly have been offered in chief, is a matter within the discretion of the court.<sup>7</sup> Whether a witness shall be examined in surre-

<sup>1</sup> 1 Greenl. Ev. (14 Ed.) § 467; *Campbell v. State*, 23 Ala. 44. See also *Commonwealth v. Wilson*, 1 Gray (Mass.) 337.

<sup>2</sup> *Gilbert v. Sage*, 5 Lans. (N. Y.) 287.

<sup>3</sup> *State v. Hoppiss*, 5 Ired. (N. C.) L. 406; *Thornton v. Thornton*, 39 Vt. 122.

<sup>4</sup> *Commonwealth v. Nickerson*, 5 Allen (Mass.) 518.

<sup>5</sup> *Thornton v. Thornton*, 39 Vt. 122.

<sup>6</sup> *Wood v. McGuire*, 17 Ga. 303.

<sup>7</sup> *Marshall v. Davis*, 78 N. Y. 414; *State v. Alford*, 31 Conn. 40; *Strong v. Connell*, 115 Mass. 575; *Babcock v. Babcock*, 46 Mo. 243; *Graham v. Davis*, 4 Ohio St. 362; *Young v. Edwards*, 72 Pa. St. 257. Compare *Clayes v. Ferris*, 10 Vt. 112; *State v. Hartigan*, 19 N. H. 248.

buttal is also discretionary with the trial judge;<sup>1</sup> and to be admissible, rebutting testimony must tend directly to weaken or impeach the proof on the opposite side; merely cumulative testimony is not matter of rebuttal.<sup>2</sup>

§ 256. **Recalling and Re-examining Witnesses.** — (1) *Generally.* Here also the rule is, that the re-examination of a witness is a matter within the discretion of the primary court, and cannot be reviewed by an appellate court.<sup>3</sup> And while the court may allow a witness to be called back for re-examination, it cannot compel either party to call back his witness unless he choose to do so. In case a witness is so called back, after being dismissed by the party who summoned him, he becomes the witness of the party calling him back against the objection of the other party; and such witness cannot be impeached by the party so calling him back.<sup>4</sup> When re-called, the court is entitled to exercise a large discretion as to the manner in which, and the extent to which, the favor granted shall be made use of.<sup>5</sup>

The court may, in a proper case, allow a witness to be re-called for the purpose of laying the foundation for his impeachment, and this, even where the witness is a defendant on trial for a crime;<sup>6</sup> and a witness may be allowed to return to the stand and testify, after a case has been submitted to the jury, and they have been addressed by counsel.<sup>7</sup> Objections to the recalling of a witness must state specifically the grounds of objection, or his testimony will not be excluded.<sup>8</sup>

It is the practice of chancery courts not to allow a witness, whose examination has been taken and closed, to be re-examined without an order of court, obtained on good cause shown.<sup>9</sup>

<sup>1</sup> Koenig *v.* Bauer, 57 Pa. St. 168.      Howell *v.* Commonwealth, 5 Gratt. (Va.) 664.

<sup>2</sup> Craighead *v.* Wells, 21 Mo. 404. See also Lott *v.* Macon, 2 Strobb. (S. C.) 178.

<sup>3</sup> Gayle *v.* Bishop, 14 Ala. 552; Freleigh *v.* State, 8 Mo. 606; Brown *v.* Burras, 8 Mo. 26; People *v.* Mather, 4 Wend. (N. Y.) 229; Law *v.* Merriells, 6 Id. 268; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267; Breidert *v.* Vincent, 1 E. D. Smith (N. Y.) 542; State *v.* Silver, 3 Dev. (N. C.) L. 332; Covanhoven *v.* Hart, 21 Pa. St. 495;

<sup>4</sup> Barker *v.* Bell, 46 Ala. 216.

<sup>5</sup> Cummings *v.* Taylor, 24 Minn. 429.

<sup>6</sup> State *v.* Horpe, 9 Kan. 119. See also Ross *v.* Hayne, 3 Greene (Iowa) 211.

<sup>7</sup> Colclough *v.* Rhodus, 2 Rich. (S. C.) 76; Thompson *v.* Poston, 1 Duv. (Ky.) 389.

<sup>8</sup> Osborne *v.* O'Reilly, 34 N. J. Eq. 60.

<sup>9</sup> Phettiplace *v.* Sayles, 4 Mason

(2) *Recalling witness to explain, correct, or re-state previous testimony.* This discretionary power of the court is frequently used in the way of permitting the witness to be recalled to explain an apparent contradiction in his testimony;<sup>1</sup> or where, through forgetfulness or inadvertence, he has misstated a fact, which mistake he discovers upon reflection, and desires to rectify;<sup>2</sup> and this leave should be given where the correction is to be made on a fact as to which he was not cross-examined, and as to which the court, the clerk, and the counsel disagreed as to whether it had been taken down correctly;<sup>3</sup> but this course will not be permitted merely to alter and correct the testimony of the witness, after the cause has been heard and discussed and decided upon the very matters of fact to which that testimony referred.<sup>4</sup>

With regard to the recalling a witness for the mere purpose of having him re-state his testimony, the court will use more caution. "It is a dangerous practice, and should be allowed, if at all, with great caution, and never with a witness whose fairness lies under any grounds of suspicion."<sup>5</sup> The court may interfere to prevent this from being done, even though the counsel on the opposite side do not object.<sup>6</sup> A mere reiteration of the former testimony of the witness will not, ordinarily, be permitted.<sup>7</sup>

The jury, however, have the right to a re-statement by a witness of such portions of his evidence as they may desire, in presence of the court, at any time before delivering their verdict.<sup>8</sup>

(3) *New matter.* Some decisions restrict the propriety of allowing a re-examination at all, unless it be confined strictly to new matter, such as arises out of the testimony of other

(U. S.) 312; *Hanson v. First &c. Church*, 3 Stock. (N. J.) 441; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *Hallock v. Smith*, 4 Johns. (N. Y.) Ch. 649.

<sup>1</sup> *State v. Rorabacher*, 19 Iowa, 154.

<sup>2</sup> *Walker v. Walker*, 14 Ga. 242.

<sup>3</sup> *Dunn v. Pipes*, 20 La. Ann. 276. S. P., *Kingston v. Tappan*, 1 Johns. (N. Y.) Ch. 368.

<sup>4</sup> *Gray v. Murray*, 4 Johns. (N. Y.)

Ch. 412. See also *Bissell v. Russell*, 23 Hun (N. Y.) 659.

<sup>5</sup> *Bigelow v. Young*, 30 Ga. 121.

<sup>6</sup> *Aiken v. Stewart*, 63 Pa. St. 30.

<sup>7</sup> *Hughes v. Mulvey*, 1 Sandf. (N. Y.) 92; *Hudspeth v. Allen*, 26 Ind. 165. See also, generally, *Jesse v. State*, 20 Ga. 156; *Edmonson v. State*, 7 Tex. App. 116.

<sup>8</sup> *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.) 139.

witnesses,<sup>1</sup> or as to facts concerning which he has not before testified;<sup>2</sup> and even then his re-examination is a matter of discretion, and not of right.<sup>3</sup>

<sup>1</sup> *Collins v. Johnson*, Hempst. (U. S.) 279; *Sawyer v. Sawyer*, Walk. (Mich.) 48.

<sup>2</sup> *Jenkins v. Eldredge*, 3 Story (U. S.) 299; *State v. Scott*, 24 La. Ann. 161.

<sup>3</sup> *United States v. Wilson*, Bald. (U. S.) 78; *Curren v. Connery*, 5 Binn. (Pa.) 488.

As to when witnesses may be re-

called and re-examined in rebuttal and surrebuttal, see *Stein v. McArdle*, 24 Ala. 344; *Reynolds v. State*, 68 Ala. 502; *Pleasant v. State*, 15 Ark. 624; *Thomasson v. State*, 22 Ga. 499; *Thomas v. State*, 27 Ga. 287; *Rust v. Shackleford*, 47 Ga. 538; *Artz v. Chicago &c. R. R. Co.*, 44 Iowa, 284; *White v. Bailey*, 10 Mich. 155; *Dunham v. Forbes*, 25 Tex. 23.

## CHAPTER XXI.

### PRIVILEGE TO REFUSE TO ANSWER, GENERALLY.

§ 257. In what Cases the Privilege may be claimed.

§ 258. When Answer may subject Witness to Civil Suit or Pecuniary Loss.

§ 259. Or to a Penalty or Forfeiture.

§ 260. Or Disgrace and Degrade him, or render him Infamous.

§ 257. In what Cases the Privilege may be claimed.— The privilege of witnesses in not being compellable to answer the questions which may affect their personal rights, is a matter of frequent occurrence and of considerable importance. The cases to be considered (viewing them in the order of their importance) are those where the witness may, by answering, subject himself, first, to a criminal prosecution; or, secondly, to a penalty or forfeiture; or, thirdly, to civil process or pecuniary loss; or, lastly, where the answering of the question may be degrading to character.

We will take up here the consideration of the second, third, and last classes of cases where the privilege has been claimed — not, however, in the order given above — reserving the first, and by far the most important and frequent claim of privilege for consideration in the next chapter.

But first let us notice a few claims of privilege which do not fall within any of the classes above named, and most of which, through statutory changes in the law, have become obsolete, and would not at this day be entertained if urged in a court of justice. Thus, it was formerly held that the plaintiff of record,<sup>1</sup> or the party for whose benefit a suit was brought,<sup>2</sup> could not be compelled, unless he waived his privilege, to testify for the defendant. So, a party in interest, in a suit in another state, could not be compelled to testify before a magistrate as a witness in that suit.<sup>3</sup> Bail could not be compelled, against their will, to testify against their

<sup>1</sup> *Owings v. Low*, 5 Gill & J. (Md.) 134.

<sup>2</sup> *Mauran v. Lamb*, 7 Cow. (N. Y.) 174.

<sup>3</sup> *People v. Irving*, 1 Wend. (N. Y.) 20.

principal.<sup>1</sup> And more recent cases assert a party's privilege to refuse to answer, in a deposition, questions tending to discover the names of his witnesses, and his manner of proving his case.<sup>2</sup> A detective, also, who during his examination-in-chief has referred to a private memorandum book to refresh his memory, may refuse its production and examination for the purpose of cross-examination, if he makes it appear to the court that he has reasonable ground of belief he would thereby subject himself to personal injury by exposure of his doings as a detective.<sup>3</sup> And public policy authorizes a judge of a court to excuse himself from testifying as to what witnesses have testified on trials before him; but it furnishes no ground of exception, should he not insist upon his right to be excused.<sup>4</sup> So, also, an officer of the government is not compellable to give evidence or to produce documents which, in his opinion, it is for the public interest to keep secret, nor in any case while he is officially engaged in the duties of his office.<sup>5</sup>

§ 258. **When Answer may subject Witness to Civil Suit or Pecuniary Loss.** — The better opinion, backed by the weight of authority, undoubtedly is, that a witness is bound to answer a question in a matter pertinent to the issue, where his answer will not expose him to criminal prosecution, or tend to subject him to a penalty or forfeiture, although it may otherwise adversely affect his pecuniary interest, or expose him to a civil action.<sup>6</sup> The constitutional provision that no

<sup>1</sup> *Shotwell v. Morris*, Coxe (N. J.) 224. But see *Garey v. Frost*, 5 Ala. 636.

<sup>2</sup> *Eaton v. Farmer*, 46 N. H. 200.

<sup>3</sup> *State v. Bacon*, 41 Vt. 526.

<sup>4</sup> *Welcome v. Batchelder*, 23 Me. 85.

<sup>5</sup> See *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Totten v. United States*, 92 U. S. 105; *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111; *Hartranft's Appeal*, 85 Pa. St. 442; *Gray v. Pentland*, 2 S. & R. (Pa.) 26; *Beatson v. Skene*, 5 Hurlst. & N. 850; *R. v. Hardy*, 24 How. St. Tr. 109; *R. v. Watson*, 32 Id. 102.

<sup>6</sup> *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Commonwealth v. Thurston*, 7 J. J. Marsh. (Ky.) 62; *Conover v. Bell*, 6 T. B. Mon. (Ky.) 157; *Taney*

*v. Kemp*, 4 Har. & J. (Md.) 348; *Naylor v. Semmes*, 4 Gill & J. (Md.) 273; *Copp v. Upham*, 3 N. H. 159; *Alexander v. Knox*, 7 Ala. 503; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Baird v. Cochran*, 4 S. & R. (Pa.) 397; *Miller v. Creyon*, 2 Brev. (S. C.) 108; *Judge of Probate v. Green*, 2 Miss. (1 How.) 146; *Zollicoffer v. Turney*, 6 Yerg. (Tenn.) 297. See *Connor v. Brady*, Anth. (N. Y.) 99; *Gorham v. Carrol*, 3 Litt. (Ky.) 221; *Black v. Coorgh*, Id. 226; *Lowney v. Perham*, 20 Me. 235; *Matter of Kip*, 1 Paige, (N. Y.) 601; *Stewart v. Turner*, 3 Edw. (N. Y.) 458; *Taylor v. Jennings*, 7 Robt. (N. Y.) 581; *Harper v. Burrow*, 6 Ired. (N. C.) L. 30; *Ward v. Shaw*, 15 Vt. 115. *Contra*, see *Web-*

one shall be compelled to accuse or furnish evidence against himself, does not relate to questions of property, but to criminal cases only.<sup>1</sup>

An early case in the District of Columbia, however, holds that a book-keeper of a bank is not obliged to answer a question, the answer to which might charge him with a loss;<sup>2</sup> and in other early cases witnesses who became voluntarily interested after suit brought, were denied the privilege as to what was known to them before,<sup>3</sup> but granted it as to what came to their knowledge after they became interested.<sup>4</sup>

§ 259. **When Answer may subject Witness to a Penalty or Forfeiture.** — Whether a witness may refuse to answer a question on the ground that his testimony would tend to expose him to a liability by way of penalty or forfeiture, is a point upon which the adjudications are less harmonious. Some respectable decisions hold that the witness is thus privileged,<sup>5</sup> even though the object of the suit is not to enforce such penalty or forfeiture, but would only expose the party to another suit for that purpose;<sup>6</sup> and others, of equal respectability deny him the privilege to refuse to answer in such cases.<sup>7</sup>

*ster v. Lee*, 5 Mass. 334; *Appleton v. Boyd*, 7 Id. 131; *Starr v. Tracy*, 2 Root (Conn.) 528; *Simons v. Payne*, Id. 406.

<sup>1</sup> *Devoll v. Brownell*, 5 Pick. (Mass.) 448; *Keith v. Woombell*, 8 Id. 217.

<sup>2</sup> *Bank of United States v. Washington*, 3 Cranch C. Ct. 295.

<sup>3</sup> *Tatum v. Lofton, Cooke* (Tenn.) 115; *Patton v. Brown*, Id. 126.

<sup>4</sup> *Simons v. Payne*, 2 Root (Conn.) 406.

<sup>5</sup> *Matter of Kip*, 1 Paige (N. Y.) 601; *Taylor v. Wood*, 2 Edw. (N. Y.) 94.

In the case last cited, it is held that where the answer to a question might subject the witness to a penalty or forfeiture, it is the duty of the examiner to inform him of his rights; and the witness may ask the advice of counsel when he desires to object to a question. But the counsel for the parties have no right to interrupt an examination, by informing the witness

that he is not bound to answer a particular question; but the objection should be stated to the examiner.

<sup>6</sup> *Poindexter v. Davis*, 6 Gratt. (Va.) 481.

<sup>7</sup> *United States v. Smith*, 4 Day (Conn.) 121; *Wilkins v. Malone*, 14 Ind. 153; *Perrine v. Striker*, 7 Paige (N. Y.) 598, in which case it is held that, although the effect of usury is to subject the usurious lender to a loss of the money lent, yet a bill for discovery and relief, in such case, is not a criminal case within the meaning of the provision of the constitution exempting persons from bearing testimony against themselves. But compare *Henry v. Salina Bank*, 1 N. Y. 83; s. c. 2 Den. 155, where it is held that a witness, or a party called as a witness, may not only object to testifying to the main fact, which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts which together would expose him to such penalty or

In applying the affirmative doctrine, it has been held that a county treasurer may refuse to answer an interrogatory put to him by a committee appointed by the county supervisors, concerning moneys in his hands as such treasurer;<sup>1</sup> that in an action to recover penalties and for forfeiture of photographic plates, for violating a copyright for chromos, defendant cannot be compelled, under a *subpœna duces tecum*, to produce his books of account and plates, to be used in evidence for plaintiff;<sup>2</sup> that in an action against a newspaper advertiser and his amanuensis, for libel, the latter could not be asked, after showing him the original manuscript of the alleged libel, whether it was in his handwriting;<sup>3</sup> that an officer to whose care a jury had been committed cannot be compelled to testify to the fact of the jury's separating after a cause was committed to them, and before they had agreed upon their verdict;<sup>4</sup> that a party to a wager cannot be compelled to testify, in an action *qui tam* to recover the penalty for betting;<sup>5</sup> that in an action of trespass *quare clausum*, where a warrant of resurvey has been ordered, neither a sheriff nor his deputy can be compelled to give evidence that the defendant in such action had not sufficient notice of the executing of such warrant;<sup>6</sup> and that a plaintiff on the record, or party in interest, when called upon to testify under the usury act of New York, cannot be compelled to disclose facts tending to show that the promissory note, to recover which the suit is brought, was discounted by him in violation of the statute concerning the discounting of notes, etc., by officers and agents of banking corporations.<sup>7</sup>

On the other hand, it is held that the purchaser of intoxicating liquors sold contrary to law, not being, under ordinary circumstances, subject to any penalty, either at common law, as inducing the seller to commit a misdemeanor, or under

forfeiture; and that it is not an answer to such claim of privilege that the statute of limitations has run against the offence, unless it appears that such answer was suggested on the trial.

<sup>1</sup> *Re Dickinson*, 58 How. (N. Y.) Pr. 260.

<sup>2</sup> *Johnson v. Donaldson*, 18 Blatchf. (U. S.) 287.

<sup>3</sup> *Simmons v. Holster*, 13 Minn. 249.

<sup>4</sup> *Howard v. Cobb*, 3 Day (Conn.) 309.

<sup>5</sup> *Anderson v. State*, 7 Ohio (Part 2d) 250.

<sup>6</sup> *Frammel v. Thomas*, 1 Har. & M. (Md.) 261.

<sup>7</sup> *Henry v. Salina Bank*, 1 N. Y. 83; 1 N. Y. Rev. Stat. 505, § 28.



the statute, may therefore be compelled by imprisonment to testify as to such sale.<sup>1</sup>

§ 260. **When Answer may tend to disgrace or degrade the Witness, or render him Infamous.**—The authorities hold that, as a general rule, a witness is not bound to answer, nor is a court authorized to compel an answer, to an inquiry tending to disgrace the witness, unless the evidence is material to the issue.<sup>2</sup> He cannot be compelled to answer if, by his testimony, he will accuse himself of an immoral act,<sup>3</sup> or where his answer will tend to degrade his moral character,<sup>4</sup> or render him infamous.<sup>5</sup> It follows that he cannot be asked (or rather compelled to answer if he objects to the question) how often he has been arrested;<sup>6</sup> or whether he has ever been convicted of a felony; the answer tends to degrade his character, and the fact is provable by higher evidence; to wit, the record of his conviction.<sup>7</sup>

But the privilege of refusing to answer is personal to the witness, and is not in any sense the privilege of the party calling him.<sup>8</sup> And where the transaction as to which the witness is interrogated constitutes the very fact in issue,<sup>9</sup> or forms any part of the issue to be tried,<sup>10</sup> the witness will be obliged to answer, however strongly it may reflect on his character.<sup>11</sup> So, where a witness voluntarily testifies to his

<sup>1</sup> Commonwealth v. Willard, 22 Pick. (Mass.) 476.

<sup>2</sup> Conway v. Clinton, 1 Utah T. 215; State v. Staples, 47 N. H. 113; Re Lewis, 39 How. (N. Y.) Pr. 155; Lohman v. People, 1 N. Y. 379. Compare State v. Patterson, 2 Ired. (N. C.) L. 346; Vaughan v. Paine, 2 Penn. (N. J.) 728; Sodusky v. M'Gee, 5 J. J. Marsh. (Ky.) 621; Clement v. Brooks, 13 N. H. 92.

<sup>3</sup> Galbraith v. Eichelberger, 3 Yeates (Pa.) 515.

<sup>4</sup> People v. Rector, 19 Wend. (N. Y.) 569.

<sup>5</sup> United States v. Dickinson, 2 McLean (U. S.) 325; United States v. Craig, 4 Wash. (U. S.) 729; Granis v. Brandon, 5 Day (Conn.) 260; People v. Herrick, 13 Johns. (N. Y.) 82; State v. Bailey, 1 Penn. (N. J.) 415.

<sup>6</sup> People v. Brown, 72 N. Y. 571; distinguishing 42 N. Y. 265, 270.

<sup>7</sup> Kirschner v. State, 9 Wis. 140.

<sup>8</sup> Clarke v. Reese, 35 Cal. 89; Brandon v. People, 42 N. Y. 265; State v. Ward, 48 Conn. 429. If the witness declines to answer on this ground, he should not be compelled to say why he declines. Merluzzi v. Gleeson, 59 Md. 214.

<sup>9</sup> Clark v. Reese, *supra*.

<sup>10</sup> Clementine v. State, 14 Mo. 112; Weldon v. Burch, 12 Ill. 374; Taylor v. Jennings, 7 Robt. (N. Y.) 581.

<sup>11</sup> Thus, in a prosecution for bastardy, a witness, introduced by defendant to prove that the complainant had carnal intercourse with another about the time the child is alleged to have been begotten, may be compelled to testify whether *he* had carnal intercourse with her about that time, she having denied that she had such intercourse with any other than defendant (Hill v. State, 4 Ind. 112); and where, in an action for debauching and en-

own infamy for the purpose of fixing crime upon another, he cannot claim the privilege when asked questions, the answers to which may weaken his former testimony or remove its weight entirely. But in such case the party putting the question, the answer to which may tend to degrade the witness, must show affirmatively that the question is relevant.<sup>1</sup>

In applying these principles, it has been held proper to ask an unmarried woman, on cross-examination (although she has a right to refuse an answer), whether she has any children;<sup>2</sup> that a female witness might refuse to answer whether she lived in a house of ill-fame;<sup>3</sup> or whether she was not generally reputed to be of unchaste habits, or was not, or had not been, unchaste;<sup>4</sup> that defendant, on trial for murder, cannot be compelled, against objection, to testify on cross-examination that he had frequented saloons, and at divers times drank, played cards and billiards in saloons;<sup>5</sup> and that upon the cross-examination of a witness, it is improper to ask him, and he need not answer, whether he has been a convict in a state prison, as the record of his conviction is the best evidence, and should be produced, if the party desires to prove the fact.<sup>6</sup> But it has been held that a juror may be examined as a witness to sustain a challenge of himself to the favor, and will not be excused from stating whether he has any prejudice against a religious sect, on the ground that the answer would disgrace him.<sup>7</sup> In Pennsylvania, the legislature can compel witnesses to answer questions, the answers to which may not show them to be criminal, but may involve them in shame and reproach;<sup>8</sup> and in North Carolina the rule is laid down that questions put to a witness

ting away the plaintiff's wife, the answer, among other things, alleged that the wife was compelled to leave her husband's house by reason of his cruelty and immorality, he having introduced a lewd woman into the house and kept her there for the purpose of sexual intercourse; it was held, on examination of the plaintiff as a witness for the defendant before the trial, that he might be examined, and compelled to answer in regard to the matters set up in the answer. *Taylor v. Jennings*, 7 Robt. (N. Y.) 581.

<sup>1</sup> *People v. Lohman*, 2 Barb. (N. Y.) 216. Compare *Clark v. Reese*, 35 Cal. 89.

<sup>2</sup> *Campbell v. State*, 23 Ala. 44; *Howell v. Commonwealth*, 5 Gratt. (Va.) 664.

<sup>3</sup> *Thorpe v. Wray*, 68 Ga. 359.

<sup>4</sup> *Howell v. Commonwealth*, *supra*.

<sup>5</sup> *Hayward v. People*, 96 Ill. 492.

<sup>6</sup> *Clement v. Brooks*, 13 N. H. 92.

<sup>7</sup> *People v. Christie*, 2 Park. (N. Y.) Cr. 579.

<sup>8</sup> *Kellar v. Roberts*, Bright. (Pa.) 109.

on cross-examination are not generally objectionable as tending to disparage him, unless the answer may subject him to indictment or to a statute penalty.<sup>1</sup> In California, there is a statute which provides that where the answer to a question pertinent to the issue only tends to disgrace the witness, it cannot be used against him, and therefore it is held that a law compelling him to answer it does not "compel him to criminate himself."<sup>2</sup>

<sup>1</sup> *State v. Davidson*, 67 N. C. 119.

<sup>2</sup> Act of April 16th, 1855; *Ex parte Rowe*, 7 Cal. 184.

## CHAPTER XXII.

### PRIVILEGE AS TO SELF-CRIMINATING TESTIMONY.

- § 261. In General; and Herein of the Maxim "*nemo tenetur seipsum accusare.*"
- § 262. In what Cases the Privilege may be claimed.
- § 263. When it may not be.
- § 264. At what Stage of the Trial, and how it may be claimed.
- § 265. The Privilege personal to the Witness.
- § 266. Shall Court or Witness determine as to Tendency to criminate.
- § 267. Effect of Refusal to answer; Comments by Court or Counsel.
- § 268. Effect of Pardon, Statute of Limitations, or Act protecting the Witness.
- § 269. Waiver of the Privilege.

§ 261. In General; and Herein of the Maxim "**Nemo tenetur seipsum accusare.**" — Liberally translated, this maxim, which is one of the oldest of the common law, means that any person, whether a party or stranger to the litigation, either in a civil suit or criminal prosecution, may, if he sees fit, refuse to answer any question put to him as a witness, either on direct or cross-examination, the answer to which, if true, will render or tend to render him punishable for crime, or disgrace him, or render him infamous. The soundness of the principle introduced into the common law by this maxim has seldom been questioned. It has been incorporated among the guaranties of personal liberty and security in all the constitutions both of England and America, and has received the sanction of the most eminent jurists of both countries. Notwithstanding this, of late years, at least one writer of ability and profound thought has attacked this principle with great vigor, denying its beneficent working under the present state of society;<sup>1</sup> while another, also a jurist of eminence and

<sup>1</sup> "It is believed that the maxim originally meant that no one should be compelled, *by torture*, to criminate himself. It was applicable to a time when suspected persons were put to the rack for the purpose of extorting confessions from them, and for refusing to plead to an indictment. The

prisoner was not allowed to produce witnesses to prove his innocence; and when he was baited, bullied and brow-beaten, both by the king's counsel and the judge, without the privilege of having the assistance of counsel to cross-examine the king's witnesses, or to argue the merits of his defence to

unquestioned ability has defended this maxim with equal earnestness, if with less vigorous language.<sup>1</sup>

The rule derived from this maxim is ordinarily expressed in the books as follows: "Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge, the witness is not bound to answer the question. If the fact to which he is interrogated forms but a link in the chain of testimony which would convict him, he is protected without being required to explain how he might be criminated by the answer, and if it is one of a series of questions, the answers to all of which would establish his criminality, he cannot be compelled to answer that or any of the series, and the court is bound to instruct him whether his answer would tend to criminate or expose him."<sup>2</sup> He may refuse to

the jury, certainly, in such a state of the law, a maxim which allowed him to keep his mouth shut, was a humane maxim, and was justly prized. But such a maxim has no place in an enlightened and humane system of jurisprudence. We have outgrown it. The reasons which brought it into existence have passed away. It remains little more than a rogue's maxim. If a gang of thieves and counterfeiters were to meet together for the purpose of framing a code of laws for their own protection, this would be the first section of their code. The just view of the matter is that the purpose of all inquiry in courts of justice is to elicit the truth, and that no privilege of not telling the truth ought to be accorded to him who, in nearly all cases, is best acquainted with the real facts of the case. An accused person ought not to be compelled by any compulsory process to testify; but the prosecution ought to be allowed to call upon him to do so, and if he refuse, the jury ought to be allowed to consider his refusal as bearing upon the probabilities of his guilt. Moreover, if he voluntarily take the witness stand in his own behalf, under modern statutes allowing him to do so, the state ought to have the privilege of cross-examining him on the

whole case." Hon. S. D. Thompson, in 5 Cr. L. Mag. 182.

<sup>1</sup> "It is an ancient maxim of the law that no man can be compelled to criminate himself — *nemo tenetur seipsum*. Neither can he be required to give testimony tending in that direction, or to disclose a single link in the chain of proof against him. This and kindred maxims, having for their object security to life, liberty and property, are so inwrought into the texture and fabric of the common law, as to cause it to breathe the spirit of justice and to become the exponent of an enlightened civilization. This principle is grafted into our federal and state constitutions, and fortified by a long and uniform course of judicial decisions. It has its foundation in natural justice, and is analogous to the right of self-defence." Chief Justice Wade, of Montana, in 2 Cr. L. Mag. 313.

<sup>2</sup> *Lea v. Henderson*, 1 Coldw. (Tenn.) 146; *Short v. State*, 4 Harr. (Del.) 568; *Marshall v. Riley*, 7 Ga. 367; *Richman v. State*, 2 Greene (Iowa) 532; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 212; *Rutherford v. Com.*, 2 Metc. (Ky.) 387; *State v. Marshall*, 36 Mo. 400; *Coburn v. Odell*, 10 Post. (N. H.) 540; *Janvrin v. Scammon*, 9 Id. 280; *Bank of Salina*

answer a question put to him on the direct examination, and which would not in itself tend to criminate, if the questions which might be rightfully put, on cross-examination, to test the truth of such answer, might form a link in a chain of evidence that would criminate him.<sup>1</sup> So, also, he cannot be compelled to answer as to any one act, the constant repetition of which would amount to a statute offence.<sup>2</sup>

§ 262. **In what Cases the Privilege may be claimed.**—The witness may claim his privilege, where the object of questions put to him is to implicate him in the compounding of a felony, and thereby to discredit him;<sup>3</sup> or to show that the witness had been accused of stealing, or had been found in possession of stolen goods.<sup>4</sup> He is not bound to answer as to how he testified on a former trial, relative to the matter in question, if he objects to the inquiry;<sup>5</sup> and an officer to whose care a jury had been committed, cannot be compelled to testify to the fact of the jury's separating after a cause was committed to them and before they had agreed upon their verdict.<sup>6</sup> In

*v. Henry*, 2 Den. (N. Y.) 155; *United States v. Moses*, 1 Cranch C. Ct. 170; *Same v. Lynn*, 2 Id. 309; *Sanderson's Case*, 3 Id. 638; *Exp. Lindo*, 1 Id. 445; *United States v. Strother*, 3 Id. 432; *Short v. State*, 4 Harr. (Del.) 568; *Fries v. Brugler*, 7 Hals. (N. J.) 79; *Stewart v. Turner*, 3 Edw. (N. Y.) 458; *People v. Mather*, 4 Wend. (N. Y.) 229; *Poole v. Perritt*, 1 Spears (S. C.) 128; *Chamberlin v. Wilson*, 12 Vt. 491; *Cook v. Corn*, 1 Overt. (Tenn.) 340; *State v. Edwards*, 2 Nott & M. (S. C.) 13. And see *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Pleasant v. State*, 15 Ark. 624; *Higden v. Heard*, 14 Ga. 255; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417. A refusal to answer, though it may effect the credit of the witness, is not ground for any injurious inference against the party calling him. *Phealing v. Kenderdine*, 20 Pa. St. 354. See also *Sir J. Friend's Case*, 10 How. St. Tr. 1090; *Lord Macclesfield's Case*, 16 Id. 1149; *R. v. Lord G. Gordon*, 2 Doug. 593; *Title v. Grevet*, 2 Ld. Raym. 1008; *R. v. Hardy*, 24 How. St. Tr. 720; *Trial of De Beren-*

*ger and others*, by Gurney, p. 195; *Cates v. Hardacre*, 3 Taunt. 424; *Parkhurst v. Lowten*, 2 Swanst. Ch. 216; *R. v. Douglas*, Car. & M. 193, 195. As to the rule in the ecclesiastical courts, see *Swift v. Swift*, 4 Hagg. 154; *Schutes v. Hodgson*, 1 Add. 105, 110; in the courts of bankruptcy, *Bracey's Case*, Comb. 390; *Ex parte Kirby*, 1 Mont. & Mac. 212; *Ex parte Cossens*, Buck. 540.

<sup>1</sup> *Printz v. Cheeney*, 11 Iowa, 469.

<sup>2</sup> *French v. Venneman*, 14 Ind. 282.

<sup>3</sup> *Pleasant v. State*, 15 Ark. 624. Thus a defendant in a bill of discovery may decline answering such allegations of the bill as may have a tendency to subject him to a criminal prosecution. *Hayes v. Caldwell*, 10 Ill. 33.

<sup>4</sup> *Howell v. Commonwealth*, 5 Gratt. (Va.) 664.

<sup>5</sup> *Mitchell v. Hinman*, 8 Wend. (N. Y.) 667; *Bellinger v. People*, Id. 595; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *State v. Blake*, 25 Me. 350.

<sup>6</sup> *Howard v. Cobb*, 3 Day (Conn.) 309. *S. P.*, *Trammel v. Thomas*, 1 Har. & M. (Md.) 261.

an action brought to recover, or upon a reference ordered to ascertain, the damages sustained by plaintiff, by the use by defendant of plaintiff's trade-mark, defendant cannot be compelled to answer questions showing or tending to show that he has sold articles manufactured by himself, with a label thereon imitating, resembling, or purporting to be the label of plaintiff, which act would be an offence within the statute.<sup>1</sup> Where a father sues for the seduction of his daughter, the issue involves the character for chastity of the daughter; but she cannot be interrogated as to acts of unchastity with others, as this would tend to criminate herself.<sup>2</sup> So, a female witness on a trial for felony cannot be asked if, while she lived with A, she was not accused of stealing or taking things not her own; and whether, when she left there, she was not followed, and the things taken from her.<sup>3</sup> And in an action to try title to an office, a witness cannot be compelled to testify whether he voted, when the evidence would tend to criminate him; but in case of his refusal to answer, another witness may be permitted to testify that the first had told him how he voted, and that he confessed himself to be an alien.<sup>4</sup>

Where a witness has testified that any judgment in the case would be for his benefit, he is privileged from answering on cross-examination a question as to whether he had gone through bankruptcy without mention of this claim.<sup>5</sup> And where, in bankruptcy proceedings, it was in proof that the bankrupt had recently lost money in a gambling-house kept by B and M at a certain house, it was held that B and M were privileged from answering whether they had resided therein.<sup>6</sup> For the same reason, a witness cannot be compelled to testify to his retaining more than lawful interest out of the amount of a security discounted by him, being indictable in such case, for receiving usury contrary to the statute;<sup>7</sup> and the same premise holds good as to a witness who has been a party to a champertous agreement.<sup>8</sup> So, also, where a railway

<sup>1</sup> *Byass v. Smith*, 4 Bosw. (N. Y.) 679; *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50.

<sup>2</sup> *Reed v. Williams*, 5 Sneed (Tenn.) 580.

<sup>3</sup> *Howell v. Commonwealth*, 5 Gratt. (Va.) 664.

<sup>4</sup> *State v. Hopkins*, 23 Wis. 309.

<sup>5</sup> *Taylor v. McIrvin*, 94 Ill. 488.

<sup>6</sup> *Re Graham*, 8 Ben. (U. S.) 419.

<sup>7</sup> *Bank of Salina v. Henry*, 2 Den. (N. Y.) 155; *Henry v. Bank of Salina*, 3 Id. 593; *Curtis v. Knox*, 2 Id. 341; *Fellows v. Wilson*, 31 Barb. (N. Y.) 162. See also *Short v. Mercier*, 1 Eng. L. & Eq. 208.

<sup>8</sup> *Douglass v. Wood*, 1 Swan (Tenn.) 393.

conductor was sued on a charge of collecting money from the passengers and not accounting to the company therefor, he was not required to answer whether he had passed persons free in the cars, or whether he had sold tickets below the regular prices.<sup>1</sup>

Where a witness who is testifying with regard to a conversation claims and is allowed his privilege as to what he said himself, on the ground that its disclosure would tend to incriminate him, the whole conversation in which the witness participated should be excluded.<sup>2</sup>

Again, it is erroneous, on a murder trial to compel the defendant to furnish evidence against himself, by exhibiting his amputated leg to the jury;<sup>3</sup> and on a trial for stealing a horse, a witness who states that he is possessed of the signs and tokens by which horse-thieves are known and recognized by each other, cannot be compelled to disclose said signs and tokens.<sup>4</sup> So, also, a former proprietor of a mercantile agency will be excused from answering as to communications made by defendant as a correspondent of the agency to the witness, on the ground that the answer might form a link to convict the witness of libel.<sup>5</sup>

The same rule of law which excuses a witness from answering questions which may tend to convict him of a crime or misdemeanor, excuses him also from producing books or papers, the contents of which may be used against him, and tend to the same result; but it must be shown that the books in question would have such a tendency.<sup>6</sup>

§ 263. **In what Cases the Privilege may not be claimed.**—It has been held that a witness cannot refuse to answer, because his answer might assist in pointing out to the prosecuting

<sup>1</sup> *Eaton v. Farmer*, 46 N. H. 200.

In *Fisher v. Ronalds* (16 Eng. L. & Eq. 417), a witness called to support a plea that the consideration for a bill was money lost at play, stated that he was present when the money was alleged to have been lost in his own house, but saw no gaming. He was then asked, "Was there a roulette table in the room?" The judge told him that his answer might tend to subject him to a prosecution under the 8 and 9 Vict., c. 109, § 2, for keeping a common gaming-house, and the

witness declined to answer. It was held that he was not compellable to answer, as the answer might have had that tendency, and that the judge did right in cautioning him.

<sup>2</sup> *Pinkard v. State*, 30 Ga. 757.

<sup>3</sup> *Blackwell v. State*, 67 Ga. 76; s. c. 44 Am. Rep. 717; 3 Cr. L. Mag. 393.

<sup>4</sup> *State v. Wilson*, 8 Iowa, 407.

<sup>5</sup> *Matter of Tappan*, 9 How. (N. Y.) Pr. 394.

<sup>6</sup> *Byass v. Sullivan*, 21 How. (N. Y.) Pr. 50.



officer sources of evidence to sustain a criminal suit against himself, of which otherwise such officer could have had no knowledge.<sup>1</sup> If properly subpoenaed before the grand jury to testify in regard to gaming, he cannot refuse to answer touching his knowledge of gaming, although his answer may show his own guilt.<sup>2</sup> So, on a trial for liquor selling, a witness for the defendant having testified that, before the alleged sale, he had purchased of the defendant all the spirits in the defendant's shop, and paid therefor, and taken a lease of the shop, and that the alleged sale was made by an agent on his account, and not on account of the defendant, it was held that the defendant had a right to ask the witness whether the transaction with him was an actual *bona fide*, or only a colorable and pretended sale.<sup>3</sup> Again, a witness for the prosecution, in a trial for a riot, may be compelled to state, on cross-examination, whether he is a member of a secret society organized to repress a sect to which defendant belongs;<sup>4</sup> and a witness in a bastardy case may be compelled to testify whether he had ever had sexual intercourse with the relatrix, it being shown by other witnesses that the circumstances (a secret marriage) were such that the act would not have been criminal.<sup>5</sup>

In an early case in Missouri, it is said that a witness is bound to testify, although he stands indicted for the same offence as the person on trial, and although he says his testimony will lead to his own conviction.<sup>6</sup> This is clearly wrong; and a similar unwarrantable disregard of the constitutional guaranty is shown in a recent case in Nevada, where, the

<sup>1</sup> *People v. Kelly*, 24 N. Y. 74.

<sup>2</sup> *Warner v. State*, 13 Lea (Tenn.) 52. In *Ward v. State* (2 Mo. 120), a witness was held guilty of contempt for refusing to answer, before the grand jury, the question "what person or persons have so bet on faro?" *S. P.*, *Richman v. State*, 2 Greene (Iowa) 532; *Hirsch v. State*, 8 Baxt. (Tenn.) 89.

<sup>3</sup> *Com. v. Kimball*, 24 Pick. (Mass.) 366. In *Hunt v. McCalla* (20 Iowa, 20), a constable was asked, when a witness before the grand jury, whether he knew of any house in a certain place "where spirituous liquors are sold."

He declined to answer, on the ground that it is a misdemeanor by statute for a peace officer who knows of a violation of the liquor law not to inform of the same, and that his answer would criminate himself. It was held that the question must be answered, as it referred to a time so recent that the answer, instead of criminating him, was in accord with his duty under the statute.

<sup>4</sup> *People v. Christie*, 2 Park. (N. Y.) Cr. 579.

<sup>5</sup> *Ford v. State*, 29 Ind. 541. Compare *Hill v. State*, 4 Ind. 112.

<sup>6</sup> *State v. Douglass*, 1 Mo. 527.

identity of the accused, on a criminal trial, being in question, and a witness having testified that he knew him, and that he had certain tattoo-marks, describing them, on his right forearm, the trial judge compelled the accused, against his objection, to exhibit his tattooed arm to the jury; and this action of the court below was affirmed on appeal, one judge (fortunately for the court) dissenting.<sup>1</sup> The position taken in this case is, in the opinion of the writer, not law. It is in direct conflict with several decisions of courts entitled to as much if not more respect than the tribunal which pronounced it.<sup>2</sup>

§ 264. **At what Stage of the Trial, and in what Manner the Privilege may be claimed.** — Ordinarily it makes no difference in the right of the witness to protection that he has before answered in part; on the contrary, he is entitled to claim the privilege at any step of the inquiry;<sup>3</sup> and it is not error to refuse to instruct a witness that if he would avail himself of his right to refuse to answer interrogatories, on the ground that the answers might criminate him, he must make the objection before answering anything upon that subject.<sup>4</sup> In one case, it is held that the court will not compel a witness, who cannot testify in a cause without criminating himself, to be sworn;<sup>5</sup> but in another, it is decided that where a party calls his adversary as a witness, he has a right to insist on his going on the stand to be sworn, although the counsel for the witness state to the court that he will not answer the questions that will be put to him, as the answers would tend to criminate him. If the questions have that tendency, the objection must be taken by the party himself, on oath.<sup>6</sup>

In an early New Hampshire case, a witness testified that he was destitute of property, but admitted, after inquiry, that he had had a considerable amount of money three or four years previous. He then stated that his money had

<sup>1</sup> *State v. Ah Chuey*, 14 Nev. 79.

<sup>2</sup> *Blackwell v. State*, 3 Crim. L. Mag. 393 (where a new trial was granted, because defendant was erroneously compelled to exhibit his amputated leg); *Doyns v. State*, 63 Ga. 699, and *Stokes v. State*, 5 Baxt. (Tenn.) 619, (where the same relief was granted because the witness was compelled to place his feet in certain

foot tracks). See also *State v. Jacobs*, 5 Jones (N. C.) L. 259.

<sup>3</sup> *Rex v. Garbett*, 3 Car. & K. 474.

<sup>4</sup> *Commonwealth v. Howe*, 13 Gray (Mass.) 26.

<sup>5</sup> *Neale v. Coningham*, 1 Cranch C. Ct. 76.

<sup>6</sup> *Boyle v. Wiseman*, 29 Eng. L. & Eq. 473; *Powell's Ev.* (4th ed.) 109.

gone to adjust matters which he could not disclose without subjecting himself to a prosecution for a crime. It was held that it was competent to the witness to claim his privilege at this stage of the examination.<sup>1</sup>

In the chancery practice, the defendant may assert his privilege to refuse to answer as to matters tending to criminate him, by demurrer, or by plea, or it may be set up in the answer. The defendant cannot even waive this protection, for the law is, in this regard, his guardian.<sup>2</sup>

§ 265. **The Privilege Personal to the Witness.**—The witness himself is the only person who can claim the protection of the rule against self-crimination. Neither the court, nor either of the parties or their counsel, can object to the witness' answering on this ground. The *question* may be lawfully put, however its tendency to draw out self-criminating testimony, and the witness must decide for himself whether he will assert his privilege, or waive it and answer.<sup>3</sup>

<sup>1</sup> *Amherst v. Hollis*, 9 N. H. 107.

<sup>2</sup> *Higdon v. Heard*, 14 Ga. 255.

<sup>3</sup> 1 Greenl. Ev., § 451; 2 Phil. Ev. 783; Whart. Crim. Ev., § 465; *Clarke v. Reece*, 35 Cal. 89; *Short v. State*, 4 Harr. (Del.) 568; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Commonwealth v. Shaw*, 4 Cush. (Mass.) 594; *State v. Wentworth*, 65 Me. 234; *Roddy v. Finnegan*, 43 Md. 490; *State v. Bilansky*, 3 Minn. 246; *Newcome v. State*, 37 Miss. 383; *White v. State*, 52 Miss. 216; *State v. Foster*, 3 Fost. (N. H.) 348; *Fries v. Burgler*, 7 Halst. (N. J.) L. 79; *Southard v. Rexford*, 6 Cow. (N. Y.) 254; *People v. Carroll*, 3 Park. (N. Y.) Cr. 73; *Ward v. People*, 6 Hill (N. Y.) 144; *People v. Bodine*, 1 Den. (N. Y.) 281; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *State v. Patterson*, 2 Ired. (N. C.) L. 346.

The privilege of refusing to answer is the privilege of the witness, not of the party; for that reason, Lord Tenterden, C. J., refused to allow counsel to support by argument the privilege as belonging to the party whom he represented. *Thomas v. Newton*, M. & M. 48, n. And see Mann. Dig. tit. Witness, 222; *R. v. Adey*, 1 Mo. & R. 94; *Marston v. Downes*, 1 A. & E. 34. Upon a similar principle, it has been

ruled that a witness who objects to the production of documents in his possession has no right to have the question of his liability to produce argued by counsel retained by him for that purpose. *Doe d. Rowcliffe v. Egremont* (Exch.) 2 Mo. & R. 386.

This privilege must belong to the witness on a principle of natural justice. The right to refuse to answer in such cases is a right of self-defence; if he has a right to defend himself against a criminal charge, he must have a full right not to expose himself to such a charge by giving evidence, and not to be accessory to his own ruin. The judge, therefore, always feels it to be his duty to apprise a witness of his privilege, as soon as a question is asked which may place him in danger. See *Rosewell's Case*, 10 How. St. Tr. 168; *Sir J. Friend's Case*, 13 How. St. Tr. 15; *Stevenson v. Jones*, Peake Ev. 179, n. (5th ed.); *R. v. De Berenger, Gurney*, 194; *Dixon v. Vale*, 1 Car. & P. 278. *R. v. Wheeler*, 2 Moo. C. C. 45; *Lord Cardigan's Case*, Gurney, 79.

In *State v. Bilansky* (3 Minn. 246), it is said that though it is the privilege of the witness alone to decline to an-

§ 266. **Shall Court or Witness determine as to Tendency to criminate.** — Whether it is the province of the court or of the witness to pass upon the tendency to criminate, of the questions which the witness refuses, under the protection of his privilege, to answer, is a question upon which the decided cases are not in entire harmony.

In England, the weight of authority gives the decision of this question to the court, whose duty it is, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretence of defending himself, screen others from justice, or withhold evidence which he might safely give. The court will require to be satisfied that the witness is acting an honest part, and that he may incur danger by answering; when satisfied of this, it will allow the privilege; to force him to reveal particulars, might lead to a prosecution, against which he has a right to protect himself.<sup>1</sup> And it would seem that this is the true doctrine; for as the witness is an interested party, his judgment liable to bias and prejudice, and his decision of the matter open to the influence of fear, or to the suspicion of bad faith, the rule that no one should sit in judgment upon his own case ought to deprive him of the right to decide the question.<sup>2</sup>

The earliest judicial utterance upon this subject in the United States is that of Chief Justice Marshall in the trial of Aaron Burr. He says: "It is the province of the court to judge whether any direct answer to the questions which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary

answer, yet it is the duty of the court to tell the witness of the privilege, and after the witness has clearly signified his design to avail himself of it, the court may refuse to allow similar questions to be put, and if put, may rule them out without consulting the witness in each case. S. P., Southard v. Rexford (6 Cow. (N. Y.) 254). But in *Commonwealth v. Shaw* (4 Cush. (Mass.) 594), it is held that it is not the duty of the judge, upon the interposition of a party, and independent of any objection of the witness, to inform the latter of the rule of law that he is not bound to criminate him-

self. S. P., *United States v. Darnaud*, 2 Wall. Jr. (U. S.) 143, 179.

<sup>1</sup> 2 Phil. Ev. \*933, and cases cited.

<sup>2</sup> And such is the prevalent opinion in this country. *Richman v. State*, 2 Greene (Iowa) 532; *State v. Duffy*, 15 Iowa, 425; *Commonwealth v. Brannard*, Thach. (Mass.) Cr. 146; *Floyd v. State*, 7 Tex. 216. To the contrary, *Warner v. Lucas*, 10 Ohio, 336; *State v. Edwards*, 2 Nott & M. (S. C.) 13; *Poole v. Perritt*, 1 Spears (S. C.) 128. Compare also *United States v. Miller*, 2 Cranch C. Ct. 247; *United States v. De Vaughn*, Id. 501; *Sanderson's Case*, 3 Id. 638; *United States v. McCarthy*, 18 Fed. Rep. 87.

and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case, the witness must himself judge what his answer will be, and if he say on his oath that he cannot answer without accusing himself, he will not be compelled to answer."<sup>1</sup> This ruling of Chief Justice Marshall, that the witness is to judge for himself whether his answer will expose him to prosecution, is adopted in a number of American cases.<sup>2</sup> Other cases, however, decide that it is for the court to determine, after the claim of privilege made under oath, whether the answer of the witness will tend to criminate him.<sup>3</sup>

But the witness will not be compelled to explain, *fully*, how his answer will tend to criminate him, if it reasonably appears to the court that it will have that effect.<sup>4</sup> It has also been held that although a witness is his own judge as to whether his answer would criminate himself, he is, neverthe-

<sup>1</sup> 1 Burr's Trial, 245; *followed in* Ward v. State, 2 Mo. 120, 123.

<sup>2</sup> See, among others, Poole v. Perritt, 1 Spears (S. C.) 128; Floyd v. State, 7 Tex. 215; Chamberlin v. Willson, 12 Vt. 491; People v. Rector, 19 Wend. (N. Y.) 569; Lister v. Boker, 6 Blackf. (Ind.) 439; Robinson v. Neal, 5 Mon. (Ky.) 212. See also, Fisher v. Ronalds, 16 Eng. L. & Eq. 417; State v. Edwards, 2 Nott & M. (S. C.) 13.

<sup>3</sup> Richman v. State, 2 Greene (Iowa) 532; State v. Duffy, 15 Iowa, 425; Commonwealth v. Braynard, Thach. (Mass.) Cr. Cas. 147; Kirschner v. State, 9 Wis. 140.

In Reg. v. Garbett (2 Car. & K. 474), a majority of the English judges were of the opinion that if a witness asserts his privilege, and there appears to be ground for believing that his answer would criminate him, he is not compellable to answer; and his answer, if compelled to give it, must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him.

In Regina v. Boyes (1 El. B. & E. 311; s. c., 9 W. R. 960), the judges decided that a merely remote possi-

bility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering. That to entitle him to this privilege the court must see, from the circumstances of the case and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. That the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things. That the position that the witness is sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive, is untenable. But that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.

<sup>4</sup> Janvrin v. Scammon, 9 Fost. (N. H.) 280; Eaton v. Farmer, 46 N. H. 200.

less, liable to an action, by the party, for a refusal to testify, if his refusal be wilful and his excuse false;<sup>1</sup> and that a witness cannot claim this privilege, on the ground that by criminating others he may excite their vengeance, so that they will give evidence which will criminate him.<sup>2</sup>

The result of a comparison of the adjudications seems to be that the preliminary question, Can *any* answer, responsive to the question, subject the witness to a criminal prosecution? must be decided by the court and not by the witness. If the court holds the affirmative of that question, then the witness has a right to decide whether the answer he would give to the question would have such an effect.<sup>3</sup>

§ 267. **Effect of Refusal to answer; Comments by Court or Counsel.**—The refusal of a witness to answer a question which imputes discredit, generally has an effect unfavorable to character, and excites suspicion—whether reasonably and justly, must depend on the sort of person produced and the question put. A man of high honor and character may be disposed to refuse with scorn and indignation to answer a question which he feels as an insult; and to infer dishonor from his silence might be the height of injustice.<sup>4</sup>

Accordingly, it is held that the refusal of a witness in a criminal trial to answer a question, upon the ground that he may thereby criminate himself, cannot be shown as a circum-

<sup>1</sup> Warner v. Lucas, 10 Ohio, 336. S. P., Whart. Cr. Ev., § 469; People v. Mather, 4 Wend. (N. Y.) 255.

<sup>2</sup> Ward v. State, 2 Mo. 120; Hirsch v. State, 8 Baxt. (Tenn.) 89. Compare Kiernan v. Abbott, 3 Thomp. & C. (N. Y.) 755; s. c., 1 Hun. 109.

<sup>3</sup> But see Emery's Case, 107 Mass. 172. Compare Lamb v. Munster, 13 Wash. L. Rep. 617; s. c., 2 Lan. L. Rev. 370; Kirschner v. State, 9 Wis. 140; State v. Lonsdale, 48 Wis. 348; Winder v. Diffenderfer, 2 Bland (Md.) 166; Mitchell's Case, 12 Abb. (N. Y.) Pr. 249.

<sup>4</sup> 2 Phil. Ev. \*949; citing Milman v. Tucker (Peake Add. Cas. 222), where a witness was asked whether he had not been convicted of forging coal-meters' certificates, and Lord Ellenborough told him he need not answer, and afterwards directed the

jury, that the witness, having availed himself of the privilege, was not thereby at all discredited; adding, that had he himself been asked such a question, he should have refused to give an answer, for the sake of the justice of the country, and to prevent such an examination. See also Rose v. Bakemore (1 Ry. & M. 384), where, a witness having refused to answer a question whether he had not published a libel, and the counsel having pressed the jury to infer from the refusal that he had done so, Abbott, C. J., interposed, saying no such inference ought to be made, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. See also Watson's Case, 2 Stark. 153, 157.

stance against him in a subsequent trial for the same offence.<sup>1</sup> From the claim of such privilege, and its allowance, no inferences whatever can be legitimately drawn injuriously affecting either party;<sup>2</sup> nor can the fact of such refusal be commented on by counsel, or taken into consideration by the jury in determining the weight to be given to the witness' testimony.<sup>3</sup> If the witness is testifying about a conversation in which he participated, when he claims his privilege, if it be granted, the whole conversation should be excluded.<sup>4</sup>

§ 268. **Effect of Pardon, Statute of Limitations, or Act protecting the Witness.**—(1) *Pardon.* A pardon duly authenticated takes away the privilege of a witness in not answering, so far as regards any risk of prosecution at the suit or in the name of the crown.<sup>5</sup> And an accomplice who has been led

<sup>1</sup> *State v. Bailey*, 54 Iowa, 414. But in Massachusetts, it was held that, on an issue between seller and purchaser of liquors, the refusal of the seller to state whether he had a license, is competent evidence against him. *Andrews v. Frye*, 104 Mass. 234.

<sup>2</sup> *Phelin v. Kenderdine*, 20 Pa. St. 354.

<sup>3</sup> *People v. Mannausau (Mich.)* 26 N. W. Rep. 797.

<sup>4</sup> *Pinkard v. State*, 30 Ga. 757.

<sup>5</sup> *Carne v. Litchfield* (2 Mich. 340), which was an action for false imprisonment, the defendant, being called upon to testify, declined answering, on the ground that the answer might criminate him, or furnish a link in the chain of evidence which might tend to criminate him. The privilege thus claimed was allowed by the court. In summing up, the plaintiff's counsel commented upon the refusal of the defendant to testify, as furnishing evidence of his guilt to be considered by the jury. Whereupon defendant's counsel asked the court to restrain the counsel. The court declined to interfere, observing "that the refusal of the defendant to answer the question propounded to him on the ground stated, was not evidence against him in the cause, yet that it was impossible to prevent the

jury from having the whole case, and knowing what was done in open court in the course of the trial before them, or to prevent counsel from commenting upon it." It was held on appeal, that although the ruling of the court, excluding any inference of guilt from the refusal of the defendant to answer the question, was correct, yet that the suggestion made by the court upon such ruling, in the hearing of the jury, the effect of which might be to deprive the defendant of the benefit of the rule, was erroneous. As to the application of this rule in criminal cases where the defendant is the witness who claims the privilege, see *infra*, § 269, *Subd.* (2)

<sup>6</sup> *R. v. Boyes*, 1 El. B. & E. 311. This was an information for bribery, filed by the attorney-general, by the direction of the House of Commons. One of the persons charged in the information to have been bribed by the defendant was called as a witness, and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the crown handed him a pardon, under the great seal, which the witness accepted, but still declined to answer. It was held that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the great seal, according to the Act of Settle-

to give evidence for the government by an express or implied promise of pardon, contracts to make a full statement, can keep back nothing, and should be allowed no privileged communications.<sup>1</sup>

(2) *Statute of limitations.* The same rule applies where all right to prosecute for the offence in the commission of which the answers of the witness may implicate him, is barred by the statute of limitations. If the statutory period within which such offence may be prosecuted has elapsed, the rule *cessat ratione cessat ipsa lex* applies — the privilege is gone, and the witness must testify.<sup>2</sup> But it is no answer to a witness' claim of privilege that the statute of limitations has run against the offence, unless it appears, affirmatively, that no proceedings to enforce a penalty were commenced within the period of limitation.<sup>3</sup>

(3) *Statute protecting the witness.* So, also, where the legislative protection against a witness' evidence being used against himself is as broad as the constitutional provision against compelling a person to criminate himself, he can be compelled to answer.<sup>4</sup> Thus, where the statute provides that the testimony given by the witness shall in no instance be used against him in any criminal prosecution for the same offence, he is protected from self-accusation, and his common law and constitutional privilege is secured to him.<sup>5</sup> Such a statute is frequently found in the books, protecting the testimony of an accomplice in the offence of gambling;<sup>6</sup> and it is not unconstitutional,<sup>7</sup> unless it compels the testimony without affording protection against its future use against the witness, in which case it clearly violates the constitutional

ment, 12 and 13 W. III., c. 2, § 3, was not a sufficient ground to entitle him to the privilege of not answering.

<sup>1</sup> Alderman v. People, 4 Mich. 414.

<sup>2</sup> Weldon v. Burch, 12 Ill. 374; United States v. Smith, 4 Day (Conn.) 121; Close v. Olney, 1 Den. (N. Y.) 319; Floyd v. State, 7 Tex. 215; Wolfe v. Goulard, 15 Abb. (N. Y.) Pr. 336; Moloney v. Dows, 2 Hilt. (N. Y.) 247.

<sup>3</sup> Bank of Salina v. Henry, 2 Den. (N. Y.) 155; s. c., 3 Id. 593.

<sup>4</sup> United States v. Three Tons of Coal, 6 Biss. (U. S.) 379.

<sup>5</sup> La Fontaine v. Southern Underwriters' Assoc., 83 N. C. 132; State v. Nowell, 58 N. H. 314; United States v. McCarthy, 16 Rep. 388.

<sup>6</sup> State v. Quarles, 13 Ark. 307; Kneeland v. State, 62 Ga. 395; Kendrick v. Commonwealth, 18 Rep. (Va.) 122; but does not cover the case of keeping a lottery. Temple v. Commonwealth, 75 Va. 892.

<sup>7</sup> Wilkins v. Malone, 14 Ind. 153; State v. Nowell, 58 N. H. 314; Kneeland v. State, 62 Ga. 395.



command that "no person shall be compelled to testify against himself."<sup>1</sup>

§ 269. **Waiver of the Privilege.**—(1) *In general.* The privilege being a purely personal one, the witness may waive it, and answer at his peril. From the nature of the right, it may be inferred that he will be at liberty to answer, or refuse to answer, any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. Such is the English rule,<sup>2</sup> subject perhaps to the qualification that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party.<sup>3</sup> The general American rule is the other way, *i.e.*, if he voluntarily discloses a part of a transaction, or conversation tending to criminate him, he waives his privilege, and must answer freely, and disclose the whole transaction or conversation;<sup>4</sup> unless the partial disclosure is made under an innocent mistake,<sup>5</sup> or does not clearly relate to the transaction as to which he refuses to testify.<sup>6</sup> If he voluntarily states a fact, he is compellable to state how he knows it, even though in so doing he may criminate himself.<sup>7</sup> If his privilege is disregarded, and he is compelled to answer, what he says cannot be used against him.<sup>8</sup>

<sup>1</sup> Ind. Rev. Stat. 1876, p. 463, § 14; *State v. Enochs*, 69 Ind. 314.

In Tennessee, it is held that the provisions of § 5089 of the Code, providing for the exemption of a witness from a prosecution for any offence in relation to which he has testified before the grand jury, does not extend to a grand juror, who communicates to his fellow-jurors his knowledge of a crime having been committed; and in doing so, voluntarily implicates himself. *State v. Hatfield*, 3 Head (Tenn.) 231.

<sup>2</sup> See *Paxton v. Douglas*, 19 Ves. 295; *R. v. Slaney*, 5 Car. & P. 214.

<sup>3</sup> See *East v. Chapman*, Moo. & M. 47; *Austin v. Poiner*, 1 Sim. 348; *Dixon v. Vale*, 1 Car. & P. 279. But compare *Garbett's Case*, 1 Den. C. C. 236, 238, where it is said that it makes no difference to the right of the witness to protection, that he has chosen to answer in part; that he may claim his privilege at any stage of the in-

quiry. In this case the judges refused to follow *East v. Chapman* and *Dixon v. Vale*.

<sup>4</sup> *People v. Freshour*, 55 Cal. 375; *Brown v. Brown*, 5 Mass. 320; *Foster v. Pierce*, 11 Cush. (Mass.) 437; *Youngs v. Youngs*, 5 Redf. (N. Y.) 505; *Chamberlain v. Willson*, 12 Vt. 491; *Norfolk v. Gaylord*, 28 Conn. 309; *Commonwealth v. Pratt*, 126 Mass. 462; *State v. Nichols*, 29 Minn. 357; *Horrell v. Parish*, 26 La. Ann. 6; *State v. K—*, 4 N. H. 562.

<sup>5</sup> *Mayo v. Mayo*, 119 Mass. 290.

<sup>6</sup> *Coburn v. Odell*, 10 Fost. (N. H.) 540.

<sup>7</sup> *State v. K—*, 4 N. H. 562; *State v. Blake*, 25 Me. 350; *Commonwealth v. Price*, 10 Gray. (Mass.) 472.

<sup>8</sup> *Horstman v. Kaufman*, 97 Pa. St. 147.

In chancery, it seems, the privilege cannot be waived. *Higdon v. Heard*, 14 Ga. 255.

(2) *Where, in a criminal case, the accused is the witness.* Where the defendant on trial for a criminal offence elects to become a witness in his own behalf, and his examination-in-chief develops a line of inquiry towards which pertinent questions are directed during the cross-examination, he having voluntarily testified at first, cannot now, when pressed, retire upon his privilege and escape. He has, by assuming the position of a witness, waived his privilege against self-crimination.<sup>1</sup> In most jurisdictions the cross-examination, like that of any other witness, must be limited to the matters opened on the direct examination,<sup>2</sup> but in some, particularly Massachusetts, the rule is that the cross-examination of any witness, even though he be the defendant in a criminal case, may extend to all matters pertinent and material to the issue, whether referred to on the direct examination or not.<sup>3</sup>

Whatever rule be followed, practically, "it will be found extremely difficult for the accused to so regulate his testimony as to be of the least avail to him and yet screen himself from cross-examination concerning matters material to the general issue of his guilt or innocence. 'Between two stools one is sure to fall,' and if the defendant would hope to create a favorable impression upon the minds of the jury, his manner must seem natural and unrestrained, his testimony appear a full, frank, complete narrative of the facts. A garbled statement would surely exert an adverse influence. To accomplish this he must needs open wide the door for scrutiny; for whenever it stands at the least crack, the courts permit the prosecution to introduce the lever of cross-examination to force it open to its full width."<sup>4</sup>

(3) *Where the witness is an accomplice of the accused.* An accomplice who has been led to give evidence for the government by an express or implied promise of pardon contracts to make a full statement, can keep back nothing, and

<sup>1</sup> *State v. Wentworth*, 65 Me. 234; 114 Mass. 285; *Com. v. Bonner*, 97 State v. Fay, 43 Iowa, 651; *State v. Huff*, 11 Nev. 17; *State v. Ober*, 52 N. H. 459; *Gill v. People*, 5 T. & C. (N. Y.) 308; *Roddy v. Finnegan* 43 Md. 490.

<sup>2</sup> *Supra*, § 246.

<sup>3</sup> *Supra*, § 247; *Com. v. Lannan*, 13 Allen (Mass.) 563; *Com. v. Mul-len*, 97 Mass. 545; *Com. v. Nichols*,

*Com. v. Curtis*, 97 Mass. 574; *Com. v. Tolliver*, 119 Mass. 312. See also *McGarry v. People*, 2 Lans. (N. Y.) 227; *Brandon v. People*, 42 N. Y. 265; *People v. Brown*, 72 N. Y. 571; *People v. Casey*, Id. 393.

<sup>4</sup> R. V. W. Du Bois, in 4 Cr. L. Mag. 339.

should be allowed no privileged communications;<sup>1</sup> but he need not disclose his criminality in other cases, and may claim his privilege at any stage of the collateral inquiries;<sup>2</sup> and it is not error for the court to instruct him as to his rights touching his examination, or to state to him that the testimony might be used against him, and that the announcement made by the prosecutor that his testimony would not be so used, might not be regarded by the judge before whom he might be tried.<sup>3</sup>

<sup>1</sup> *Alderman v. People*, 4 Mich. 414; <sup>2</sup> *Pitcher v. People*, 16 Mich. Lockett v. State, 63 Ala. 5; Com. v. 142.  
Price, 10 Gray (Mass.) 472; Foster <sup>3</sup> *Marler v. State*, 68 Ala. 580.  
v. People, 18 Mich. 266.

## CHAPTER XXIII.

### PRIVILEGED COMMUNICATIONS.

- § 270. In General; Scope of this Chapter.
- § 271. Between Counsel and Client.
- § 272. Between Physician and Patient.
- § 273. Between Clergyman and Layman.
- § 274. Between Husband and Wife.
- § 275. Judges and Arbitrators.
- § 276. State Secrets; Communications between Officials.
- § 277. Secrets of the Jury-Room.
- § 278. Other Cases.

§ 270. **In General; Scope of this Chapter.**—No attempt is here made to present all the adjudications upon privileged communications, many of them belonging more properly to the general subject of *evidence*, than to the more limited one of *witnesses*; but a selection has been made of such cases as seemed to the writer to furnish the rules governing the *competency* of attorneys, physicians, clergymen, judges, arbitrators, public officers, and jurors, as witnesses, to testify in relation to facts coming to their knowledge, *as such*; as well as the *right* of either party to a valid marriage, to divulge upon the witness-stand a communication had with the other during the existence of such marriage. For many decisions on the general subject not cited here, the reader is referred to the extended works on evidence, of Greenleaf, Phillipps, Taylor, Best, and others.

§ 271. **Between Counsel and Client.**—Where an attorney is consulted on business within the scope of his profession, the communications between him and his client are strictly confidential; and the attorney should neither be required nor permitted, by any judicial tribunal, to divulge them against his client, if the latter objects to the evidence.<sup>1</sup>

The entire professional intercourse, whatever it may have consisted in, should be protected by profound secrecy. Hence professional communications of every character are forbidden

<sup>1</sup> *Murray v. Dowling*, 1 Cranch, C. C. (Ind.) 465; *Winsor v. Clark*, 39 Me. 151; *Jenkinson v. State*, 5 Blackf. 428.

to be given in evidence against a client by an attorney.<sup>1</sup> And such communications will be protected from disclosure, notwithstanding the absence of any injunction of secrecy.<sup>2</sup> By professional communications are meant, not only what the client may have said to his attorney as such, but every fact which the attorney has learned only in his character as attorney.<sup>3</sup>

But a lawyer may be compelled to disclose by whom he was employed in a cause, and that he was instructed by one person to follow the directions of another in the prosecution of the business, although the knowledge was acquired by confidential consultations as counsel and clients.<sup>4</sup> So he may be compelled to answer as to the state of a paper that has come into his hands.<sup>5</sup> And a communication made to him by a debtor, who applied to him to draw up a mortgage deed, merely to explain his motives, no legal advice as to the effect of the conveyance being asked or given, is not a privileged communication which the attorney can refuse to testify to.<sup>6</sup> So, also, terms of compromise, offered by a counsel to the creditors of his client, are not confidential, and must be disclosed.<sup>7</sup> And the same is true of a communication voluntarily made to counsel, after he has refused to be employed by the party making it;<sup>8</sup> or after his employment as attorney

<sup>1</sup> *State v. Douglass*, 20 W. Va. 770. When he can testify for his client, see *Chappell v. Smith*, 17 Ga. 68; *Hines v. State*, 26 Ga. 614; *Foster v. Hall*, 12 Pick. (Mass.) 89; *Hatton v. Robinson*, 14 Id. 416, 421. See *Greenough v. Gaskell*, 1 My. & K. 102, 103; *Cleave v. Jones*, 8 Eng. L. & E. 554; *Robson v. Kemp*, 5 Esp. 52.

<sup>2</sup> *Wheeler v. Hill*, 4 Shep. (Me.) 329; *Brand v. Brand*, 39 How. (N. Y.) Pr. 193. See, also, *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *Blunt v. Tunts*, Anth. (N. Y.) 180; *Re Bellis*, 38 How. (N. Y.) Pr. 79. Communications made to a person not an attorney at law, of the party, though made under the obligations of secrecy, are not privileged. *Sherman v. Sherman*, 1 Root (Conn.) 486; *Mills v. Griswold*, Id. 383; *Calkins v. Lee*, 2 Id. 363; *Dixon v. Parmelee*, 2 Vt. 185. The rule does not apply to attorneys

in fact. *McLaughlin v. Gilmore*, 1 Ill. App. 563; *Holman v. Kimball*, 22 Vt. 555; *Matthew's Estate*, 4 Am. L. J. n. s. 356.

<sup>3</sup> *State v. Douglass*, 20 W. Va. 770.

<sup>4</sup> *Brown v. Payson*, 6 N. H. 443; *Gower v. Emery*, 6 Shep. (Me.) 79. In Louisiana, an attorney may be called and compelled to testify against his client in respect to matters not confidential. *Cox v. Williams*, 5 Mart. (La.) 139; *Reeves v. Burton*, 6 Id. 283. See also *Howard v. Copley*, 10 La. Ann. 504.

<sup>5</sup> *Baker v. Arnold*, 1 Cai. (N. Y.) 258.

<sup>6</sup> *Hatton v. Robinson*, 14 Pick. (Mass.) 416. See also *Root v. Wright*, 21 Hun (N. Y.) 344.

<sup>7</sup> *McTavish v. Denning*, Anth. (N. Y.) 113.

<sup>8</sup> *Setzar v. Wilson*, 4 Ired. (N. C.) L. 501. But if the communication is

has ceased,<sup>1</sup> and, at least in Georgia, as to facts which occurred in another case previous to his employment in the case on trial.<sup>2</sup> So, also, the attorney may divulge where the party who consulted him waives the privilege; and this, although the interest in the subject-matter of the confidential communication has passed to a third person, who objects to the disclosure.<sup>3</sup>

In what cases an attorney may be compelled to produce papers in his possession, belonging to his client, see the authorities cited below.<sup>4</sup>

The protection extends to professional communications conveyed to either party by the other through an intermediary channel, such as an interpreter,<sup>5</sup> or agent employed by the attorney,<sup>6</sup> such person being as much bound to secrecy as the attorney himself. Thus the rule of secrecy extends to an attorney's clerk.<sup>7</sup>

But public policy has engrafted on this general rule an important exception — the communication, to be privileged, must relate to a lawful object; thus it has been quite recently held that communications between a solicitor and his

made to the attorney under the erroneous impression that he has consented to act as such, it is privileged. *Smith v. Fell*, 2 Curt. (Mass.) 667.

<sup>1</sup> 1 Greenl. Ev. (14 ed.) § 244.

<sup>2</sup> *Churchill v. Corker*, 25 Ga. 479; *Sharman v. Morton*, 31 Ga. 34. The privilege seems to be that of the attorney. *Willis v. State*, 60 Ga. 613.

<sup>3</sup> *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353 (Bronson, J., dissenting). Compare *Bacon v. Frisbie*, 80 N. Y. 394. Production of fragmentary parts of an attorney's letter by the client is a waiver of privilege as to the whole letter. *West. Union Tel. Co. v. B. & O. Tel. Co.*, 26 Fed. Rep. 55. That the act of the client in going on the stand as a witness is a waiver, see *Woburn v. Henshaw*, 101 Mass. 193; but he may still object to the disclosure by the lawyer, even though he called him as a witness himself. *Montgomery v. Pickering*, 116 Mass. 227. That going on the stand is not a waiver by the client, see *Hemenway v. Smith*, 28 Vt. 701; *Bigler v. Rey-*

*her*, 43 Ind. 112; *Barker v. Kuhn*, 38 Iowa, 395; *State v. White*, 19 Kan. 445; *Duttenhoeffer v. State*, 34 Ohio St. 91.

<sup>4</sup> *Andrews v. Ohio &c. R. R. Co.*, 14 Ind. 169; *Anonymous*, 8 Mass. 370; *Mitchell's Case*, 12 Abb. (N. Y.) Pr. 249; *People v. Sheriff of New York*, 29 Barb. (N. Y.) 622; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33; *Com. v. Moyer*, 15 Phil. (Pa.) 397.

<sup>5</sup> *Du Barré v. Lavette, Peake Cas.* 77, explained in 4 T. R. 756; *Jackson v. French*, 3 Wend. (N. Y.) 337; *Parker v. Carter*, 4 Munf. (Va.) 273.

<sup>6</sup> *Parkins v. Hawkshaw*, 2 Stark. 239; *Bunbury v. Bunbury*, 2 Beav. 173; *Steele v. Stewart*, 1 Phil. Ch. 471; *Carpmael v. Powis*, 9 Beav. 16.

<sup>7</sup> *Taylor v. Foster*, 2 Car. & P. 195; *R. v. Upper Boddington*, 8 Dow. & Ry. 726; *Jackson v. French*, 3 Wend. (N. Y.) 337; *Power v. Kent*, 1 Cow. (N. Y.) 211; *Mills v. Oddy*, 6 Car. & P. 728; *Bowman v. Norton*, 5 Id. 177. And see generally 1 Phil. Ev. (5 Am. Ed.) \*130 n.

client with a view to obtaining legal assistance in the commission of a crime, are not privileged, even though the solicitor is ignorant of such intent on the part of his client.<sup>1</sup> Such communications partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful, but under certain circumstances becomes the duty of the attorney to divulge them. "The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases."<sup>2</sup>

§ 272. **Between Physician and Patient.** — The common law does not extend the privilege we are examining to physicians or surgeons, so they and their patients are confined to statutory protection, which in many of the States is as full as exists between attorney and client;<sup>3</sup> nor is it necessary that the relation of physician and patient should actually exist, if the visit was made under such circumstances as to lead the party visited to suppose that the visit was professional, and to act on it as such.<sup>4</sup> Under the New York statute the protection is held to extend to information received by eye or ear: from observation of the patient's symptoms, from the patient himself, or from the statements of others around him.<sup>5</sup>

It needs not that an examination of a patient should be private, to exclude information so derived; nor is it required that it should be shown, in the first instance, by formal proof, that the information was necessary to enable the physician to prescribe;<sup>6</sup> and even the death of the patient does not remove the prohibition;<sup>7</sup> in such an event the privilege is not limited to the personal representative of the patient, but an

<sup>1</sup> *R. v. Cox*, 6 Cr. L. Mag. 569, reviewing English cases; *People v. Van Alstine*, Id. 715.

<sup>2</sup> *Cox v. Van Alstine*, *supra*, citing the American cases on this point.

<sup>3</sup> See the *résumé* of the statutes, *supra*, Chap. VIII.; *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74.

<sup>4</sup> *People v. Stout*, 3 Park. (N. Y.) Cr. 670.

<sup>5</sup> *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; s. c., 24 Hun, 43; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Masonic Mut. Benefit*

*Assoc. v. Beck*, 77 Ind. 203; s. c., 40 Am. Rep. 295; *Gartside v. Conn. Mut. Life Ins. Co.*, 76 Mo. 446; s. c., 43 Am. Rep. 765; *Linz v. Massachusetts Ins. Co.*, 8 Mo. App. 363.

<sup>6</sup> *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281. Compare *Grattan v. National Life Ins. Co.*, 15 Hun (N. Y.) 74; *Collins v. Mack*, 31 Ark. 684.

<sup>7</sup> *Grattan v. Metropolitan Life Ins. Co.*, *supra*. See, also, *Same v. Same*, 24 Hun (N. Y.) 43; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185.

assignee may exercise it, and his right is not affected by the decease of the patient.<sup>1</sup>

<sup>1</sup> *Edington v. Mutual Life Ins. Co.*, *supra*.

In *Capitll v. Verback* (58 Iowa, 98), a breach of promise case, a physician called for the defence was asked if, at a certain time previous to the trial, plaintiff had consulted him as to getting rid of a child with which she was pregnant. It was held, there being no evidence of unlawful purpose, that the communication was privileged.

So, in an action on a life insurance policy, statements in the proof of death, made by the physician of the insured, as to the previous complaints and ailments of the insured, are privileged communications, and not admissible to show that the answers made to certain questions in the application for insurance were false. *Dreier v. Continental Life Ins. Co.*, 24 Fed. Rep. 670.

In *Westover v. Ætna Life Ins. Co.*, 1 N. East. Rep. 104; s. c., 14 Ins. L. Jour. 522, the court, speaking of these statutes, say: "These provisions of law are founded upon public policy, and in all cases where they apply, the seal of the law must forever remain, until it is removed by the person confessing, or the patient, or the client. *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Edington v. Ætna Life Ins. Co.*, 77 N. Y. 564; *Pierson v. People*, 79 N. Y. 424; *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281. . . . In *Pierson v. The People*, it was said: 'The plain purpose of this statute was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead.' In *Grattan v. Metropolitan Life Ins. Co.*, Danforth, J., said: 'The case before us is not where the witness was called in for the first time after the death of the patient, but one where the lips of the physician were sealed during the life

of the patient, and where, although by death he loses the patient, his lips must remain closed. It was held under the old law that the seal must remain until removed by the patient, and it is now so provided by statute.' The purpose of the law would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. [But see *Fraser v. Jennison*, 42 Mich. 206.] He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator. If one representing the property of a patient can waive the seal of the statute because he represents the property, then the right to make the waiver would exist as well before death as after, and a general assignee of a patient for the purpose of protecting the assigned estate could make the waiver; and yet it has been held that an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor shall be disclosed. *Bowman v. Norton*, 5 Car. & P. 177. In *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, it was not decided nor stated that a personal representative could waive the protection of the statutes, but it



But this, like the client's privilege, may be waived by the patient.<sup>1</sup> The communication, also, to be privileged, must have been necessary to enable the physician or surgeon to prescribe or act in a professional capacity;<sup>2</sup> but this will ordinarily be presumed, and need not be proved in the first instance.<sup>3</sup>

In probate contests, and other testamentary cases, the statutory provision seems not to apply, and the attending physicians of the deceased may disclose information professionally obtained.<sup>4</sup> So, also, a physician may be compelled to testify as to the result of a *post mortem* examination made by him.<sup>5</sup> And the rule is confined to a regular physician on the one hand (and does not extend to communications made to a student in his office, unless shown to fall within the statute);<sup>6</sup> and to the patient himself, on the other (not covering the case of communications to the physician by a third person, applying for medicines to be administered to the patient).<sup>7</sup>

§ 273. **Between Clergyman and Layman.**—Here, too, the common law places no obstacle in the way of full disclosure, but in many jurisdictions there are also statutory provisions to the effect that a clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.<sup>8</sup> But a clergyman is a competent witness against a defendant charged with a crime, as to any confession thereof by the latter, not made in the course of discipline enjoined

was held that the personal representative or assignee of the patient could make the objection to evidence forbidden by the statute; and the opinion might have gone further, and held that any party to an action could make the objection, as the evidence in itself is objectionable unless the objection be waived by the person for whose protection the statutes were enacted."

<sup>1</sup> *Fraser v. Jennison*, 42 Mich. 206; *Grand Rapids &c. R. R. Co. v. Martin*, 41 Id. 667; *Scripps v. Foster*, Id. 742; *Territory v. Corbett*, 3 Mont. T. 50.

<sup>2</sup> *Collins v. Mack*, 31 Ark. 684; *Campan v. North*, 39 Mich. 606.

<sup>3</sup> *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281.

<sup>4</sup> *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221; *Staunton v. Parker*, 19 Hun (N. Y.) 55; *Whelpley v. Loder*, 1 Demarest (N. Y.) 368.

This has been recently held the other way in an unreported case in the New York Court of Appeals.

<sup>5</sup> *Summers v. State*, 5 Tex. App. 365.

<sup>6</sup> *Kendall v. Grey*, 2 Hilt. (N. Y.) 300.

<sup>7</sup> *Babcock v. People*, 15 Hun (N. Y.) 347.

<sup>8</sup> See *supra*, Chap. VIII., for the text of these statutes.

by the church.<sup>1</sup> And statements made to an elder, who is also a deacon in the church, and who is engaged in looking up evidence in support of charges against a member of the church, are not so made.<sup>2</sup>

§ 274. **Between Husband and Wife.**—As we have stated in a former chapter,<sup>3</sup> at common law, neither the husband nor the wife is a competent witness either for or against the other; but this rule has been greatly relaxed in many jurisdictions, and almost, if not entirely, abrogated in others. Still, inasmuch as the doctrine of privileged communications rests, as applied to husband and wife, on grounds of its own, the various enabling statutes, so called, have not much changed the law in this respect.<sup>4</sup> Mr. Greenleaf says: "The communications between husband and wife are privileged, independently of the ground of interest and identity which precluded the parties from testifying for or against each other."<sup>5</sup> Thus, a wife cannot testify either for or against her husband, as to papers consigned by him to her care, and kept exclusively by her under lock and key;<sup>6</sup> or to the state of his accounts kept by her, from original memoranda, made by him from day to day.<sup>7</sup>

As to whether communications made in the presence of third persons, are equally privileged, there is a division of judicial opinion.<sup>8</sup> If the communication is in writing and

<sup>1</sup> *Gillooley v. State*, 58 Ind. 182; *People v. Gates*, 13 Wend. (N. Y.) 311.

<sup>2</sup> *Knight v. Lee*, 80 Ind. 201; Ind. Acts, 1879, p. 245.

While, under English law, a confession to a clergyman (*R. v. Sparks*, cited in *Du Barré v. Livette*, Peake N. P. 77; *R. v. Gilham*, Ry. & M. 186), or to a Catholic priest (*Butler v. Moore*, Macn, 253), is not privileged; yet, in one case, *Best, C. J.*, said that he would never compel a clergyman to disclose communications made to him by a prisoner; but if he chose to disclose them, he should receive them in evidence (*Broad v. Pitt*, 3 Car. & P. 519; s. c., *Moo. & M.* 234). And Bentham contends that the priest ought not to be compelled to disclose, upon the ground that confession, in the Roman Catholic church, is a

religious duty, and that to compel the disclosure, by means of punishment, would be in effect to punish the party for religious opinions. *Rationale Judicial Evidence*, Bk. 9, pt. 3, ch. 6.

<sup>3</sup> *Supra*, Chap. X.

<sup>4</sup> *Raynes v. Bennet*, 114 Mass. 424.

<sup>5</sup> 1 Greenl. Ev. § 254. See also 2 *Best*, Ev. p. 995, § 586; *Goodright v. Moss*, Cowp. 594.

<sup>6</sup> *Stanford v. Murphy*, 63 Ga. 410.

<sup>7</sup> *Easterbrooks v. Prentiss*, 34 Vt. 457.

<sup>8</sup> That they are, see *Campbell v. Chace*, 12 R. I. 333; *Low's Estate*, Myrick, Prob. (Cal.) 143; *Holman v. Bachus*, 73 Mo. 49; *Bird v. Hueston*, 16 Ohio St. 418. To the contrary, see *McCague v. Miller*, 36 Ohio St. 595; *Fay v. Guynon*, 131 Mass. 31; *Com. v. Griffin*, 110 Mass. 181; *State v. Car-*

falls into the hands of a third person, it is held that the privilege fails.<sup>1</sup>

The duration of the privilege does not depend upon that of the marriage: neither divorce,<sup>2</sup> nor the death of one of the parties<sup>3</sup> will remove the bar of secrecy.

In applying these principles the husband has been held incompetent to testify that the wife delayed to communicate to him the particulars of an assault alleged to have been committed upon her — the law guards the marital confidence of silence as well as that of communication.<sup>4</sup> That where such a communication is repeated by the husband or the wife to a third person, the latter cannot disclose it on the witness-stand;<sup>5</sup> otherwise, where the communication is overheard by the witness, when made.<sup>6</sup> In some States the statute protects only *private* conversations, *i.e.*, conversations between husband and wife when alone, or with none but their young children;<sup>7</sup> if *private*, the conversation need not be *confidential*.<sup>8</sup> In New Jersey, however, only *confidential* communications are protected.<sup>9</sup> In England,<sup>10</sup> and in some of the States, all communications between the parties, made during the marriage, are protected,<sup>11</sup> and in one or more States there is no statute, the common law rule prevailing.<sup>12</sup>

ter, 35 Vt. 378; *Allison v. Barrow*, 3 Coldw. (Tenn.) 414.

<sup>1</sup> *State v. Buffington*, 20 Kan. 599.

In *Higbie v. McMullan* (18 Kan. 133) it is held that a wife may testify to communications made by the husband to a third person, in her hearing, when he is not a party to the suit or interested therein. *S. P.*, *Griffin v. Smith*, 45 Ind. 336. But in Missouri the privilege extends to all cases, whether the husband is a party or not. *Moore v. Wingate*, 53 Mo. 398.

<sup>2</sup> *Anderson v. Anderson*, 9 Kan. 112. *S. P.*, *Cruse v. Rutledge*, 81 Ill. 266. But compare *Crook v. Henry*, 25 Wis. 569; *Elswick v. Commonwealth*, 13 Bush (Ky.) 155.

<sup>3</sup> *Low's Estate*, Myrick, Prob. (Cal.) 143; *Brooks v. Francis*, 3 Mac-Arth. (U. S.) 109. But under the New York Statute of 1867 it was held that either spouse could waive the privilege. *Southwick v. Southwick*,

9 Abb. Pr. n. s. 109; *s. c.*, 2 Sweeny, 234, *affirmed*, 49 N. Y. 510. *Contra*, see *Bevins v. Cline*, 21 Ind. 37. And in Connecticut it is held that, on a criminal trial, the State may introduce letters written by defendant to his wife. *State v. Hoyt*, 47 Conn. 518.

<sup>4</sup> *Goodrun v. State*, 60 Ga. 509.

<sup>5</sup> *Brown v. Wood*, 121 Mass. 137.

<sup>6</sup> *Com. v. Griffin*, 110 Mass. 181; *State v. Carter*, 35 Vt. 378.

<sup>7</sup> *Jacobs v. Hesler*, 113 Mass. 157.

<sup>8</sup> *Dexter v. Booth*, 2 Allen (Mass.) 559; *Raynes v. Bennett*, 114 Mass. 425.

<sup>9</sup> *Wood v. Chelwood*, 12 C. E. Gr. (N. J.) 311.

<sup>10</sup> 16 and 17 Vict. c. 83, § 3.

<sup>11</sup> See the statutes *supra*, Chap. X.

<sup>12</sup> *White v. Perry*, 14 W. Va. 66.

In *Otes v. Spenser* (102 Ill. 622) it is held that a husband may testify, in favor of his wife, to transactions and conversations occurring before

§ 275. **Judges and Arbitrators.** — (1) *Judges.* At common law, a judge of a court cannot be compelled to state, as a witness, what occurred before him in court. Thus the chairman of the court of quarter sessions was held privileged from testifying, on the trial of an indictment for perjury alleged to have been committed in his court, as to what the accused swore at that trial.<sup>1</sup> But he is competent, if the privilege be not insisted on,<sup>2</sup> and his notes or minutes of the trial are evidence of a high order.<sup>3</sup>

It has been held that a judge sitting alone to try a cause cannot testify as a witness at the same trial; and the same rule applies where he sits with others, if his presence on the bench is necessary to a duly organized court.<sup>4</sup> Still, if, in the latter case, he does testify, and no exception is taken, the judgment will not be invalidated for that reason.<sup>5</sup> These principles are equally applicable to referees and other judicial officers.<sup>6</sup>

A justice is competent as a witness to verify his minutes, in order to prove the testimony of a witness in a case tried before him,<sup>7</sup> or to prove the proceedings had and the judgment rendered;<sup>8</sup> but unless so verified his entries are not evidence.<sup>9</sup> So, also, a justice may testify upon what papers

marriage. In *Hanks v. Van Garder* (59 Iowa, 179) testimony of the widow as to a transfer of a claim to her by her husband before his death, was not excluded as a "communication" between husband and wife. In *Thompson v. Silvers* (59 Iowa, 670) a wife garnished on execution against her husband was not excused from answering whether she was indebted to him or had money or property belonging to him. And in *United States v. Guiteau* (1 Mack. (D. C.) 498), the question asked of a wife concerning her husband, whether she ever saw anything indicating that he was a man of unsound mind, was held not protected by the rule as to privileged communications.

<sup>1</sup> *R. v. Gazard*, 8 Car. & P. 595. *S. P.*, *Agan v. Hey*, 30 Hun (N. Y.) 591. Compare *Supplès v. Cannon*, 44 Conn. 430; *Taylor v. Larkin*, 12 Mo. 103.

<sup>2</sup> *Huff v. Bennett*, 4 Sandf. (N. Y.) 120; *Schall v. Miller*, 5 Whart. (Pa.) 156.

<sup>3</sup> *Ex parte Gillebrand*, L. R. 10 Ch. 52.

<sup>4</sup> *Dabney v. Mitchell*, 66 Ala. 495; *People v. Miller*, 2 Park. (N. Y.) Cr. 197. See also *McMillen v. Andrews*, 10 Ohio St. 112.

<sup>5</sup> *People v. Dohring*, 59 N. Y. 374.

<sup>6</sup> *Morss v. Morss*, 11 Barb. (N. Y.) 510.

<sup>7</sup> *Huff v. Bennett*, 4 Sandf. (N. Y.) 120; 6 N. Y. 337; *Welcome v. Batchelder*, 23 Me. 85; *Schall v. Miller*, 5 Whart. (Pa.) 156; *Zitske v. Goldberg*, 38 Wis. 216.

<sup>8</sup> *Pollock v. Hoag*, 4 E. D. Smith (N. Y.) 473; *McGrath v. Seagrave*, 2 Allen (Mass.) 443; *Boomer v. Laine*, 10 Wend. (N. Y.) 526; *Hibbs v. Blair*, 14 Pa. St. 413.

<sup>9</sup> *Schafer v. Schafer*, 93 Ind. 586.

process was issued by him,<sup>1</sup> or as to various other collateral matters.<sup>2</sup>

(2) *Arbitrators.* The same general rule applies to arbitrators. Thus, it is held that an arbitrator cannot be admitted as a witness to impeach the award; he cannot be sworn to prove a mistake in making it up.<sup>3</sup> Having signed it, he cannot be permitted to say that he did not concur in it.<sup>4</sup> But where an umpire is called in, one of the arbitrators (whose functions thereupon cease), who did not concur in the award, may be received as a witness to show that the umpire exceeded his authority.<sup>5</sup> The rule is general and well settled that the award of arbitrators cannot be shown by parol testimony to mean something different from what it plainly declares; and that not even the testimony of the arbitrators themselves can be received to contradict or impeach it.<sup>6</sup>

An arbitrator is competent to prove that matters were included in the award not contained in the submission, but not competent to contradict the terms of the award or to prove errors or mistakes made by the arbitrators.<sup>7</sup> He is not competent to show the misconduct of himself or his associates, by testifying to what occurred in their intercourse with each other or in their deliberations; but he is competent to prove the time of the last hearing, which was beyond the time limited in the submission, and what occurred openly at a previous hearing, fixing the time for the final summing up and submission of the cause.<sup>8</sup> In *Haggart v. Morgan*,<sup>9</sup> the umpire was called as a witness, and testified without objection that he united with one of the arbitrators in making an award, after the time limited by the submission; and the arbitration having failed without the fault of either party, an action was sustained on the contract which itself provided for a settlement of any disputes under the same by arbitrators.

<sup>1</sup> *Heywood's Case*, 1 Sandf. (N. Y.) 701.

<sup>2</sup> *Highberger v. Stiffler*, 21 Md. 238; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498.

<sup>3</sup> *Newland v. Douglass*, 2 Johns. (N. Y.) 62.

<sup>4</sup> *Campbell v. Western*, 3 Paige (N. Y.), 124.

<sup>5</sup> *Mayor &c. of N. Y. v. Butler*, 1 Barb. (N. Y.) 326.

<sup>6</sup> *Doke v. James*, 4 N. Y. 568; *Fidler v. Cooper*, 19 Wend. (N. Y.) 284; *Dater v. Wellington*, 1 Hill (N. Y.) 319.

<sup>7</sup> *Briggs v. Smith*, 20 Barb. (N. Y.) 409.

<sup>8</sup> *Cole v. Blunt*, 2 Bosw. (N. Y.) 116.

<sup>9</sup> 5 N. Y. 422.

For further decisions as to the competency of judges and arbitrators, see *supra*, § 45.

§ 276. **State Secrets; Communications between Officials.** — Evidence of matters and things, the disclosure of which would be prejudicial to the public interests, is excluded by the law, from motives of sound public policy, and with a view to the permanence of the public safety. These matters are of two classes: (1) those which concern the administration of penal justice, and (2) those which concern the administration of the government. In both cases the ground of exclusion is the same, and where the public safety is in no way involved, the rule should not be applied.<sup>1</sup>

Thus, on the trial of a criminal case, the officer who apprehended the prisoner, being examined as a witness for the United States, is not bound to disclose the name of the person from whom he received the confidential information which led to the prisoner's detection.<sup>2</sup> So, also, on a larceny trial, a

<sup>1</sup> "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against the laws. To encourage him in performing this duty, without fear of consequences, the law holds such information to be among the secrets of State, and leaves the question how far, and under what circumstances, the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to the views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. . . . The question before us is not one of the law of slander or libel, but of the law of evidence; not whether the communications of the defendant to the officers of the treasury are so privileged from being considered as slanderous, as to affect the

right to maintain an action against the defendant upon or by reason of them, but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. The reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense, and cannot be disclosed without the permission of the secretary of the treasury. And it is quite clear that the discovery of documents, which are protected from disclosure upon grounds of public policy, cannot be compelled either by bill in equity or interrogatories at law." *Worthington v. Scribner*, 109 Mass. 487. This case fully reviews the leading authorities, and comments adversely upon *R. v. Richardson* (3 Fost. & F. 693), where an officer was compelled, on cross-examination, to disclose from whom he got the information, in consequence of which he discovered the poison in a place used by the accused. See *R. v. Richardson*, explained in *Steph. Dig. Ev. Art. 113*. See also *Oliver v. Pate*, 43 Ind. 132.

<sup>2</sup> *United States v. Moses*, 4 Wash. 726. *S. P.*, *Atty.-Gen. v. Briant*, 15 L. J. (Exch.) n. s. 265.

witness, from whom the property is charged to have been stolen, is not bound to disclose the names of persons in his employment, who gave the information which induced him to take measures for the detection of the persons indicted.<sup>1</sup>

But it seems communications, though made to official persons, are not privileged, when they are not made in the discharge of any public duty; as a letter written by a private individual to the secretary of the postmaster general, complaining of the conduct of the guard of the mail.<sup>2</sup>

§ 277. **Secrets of the Jury-Room.**—(1) *Grand jury.* This subject has already been discussed in a former part of this work,<sup>3</sup> and only a few decisions, some of which are not there cited, will be referred to here.

It is only by virtue of statutory provisions that grand jurors are competent to testify to facts coming to their knowledge as such; and when a statute exists prescribing the case or cases in which they may so testify, such statute is to be strictly construed, and the case must fall clearly within its provisions, or the witness cannot testify.<sup>4</sup> The statutes of

<sup>1</sup> *State v. Soper*, 16 Me. 293. Said Lord Chief Justice Eyre, in *Rex v. Hardy* (24 How. St. Tr. 808): "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed." See, also, *R. v. Watson*, 2 Stark. 136; *Home v. Lord Bentinck*, 2 Brod. & B. 130; *R. v. Ackers*, 6 Esp. 125, where Lord Kenyon said: "The defendant's counsel have no right, nor shall they be permitted to inquire the name of the person who gave the information of the smuggled goods." And also *Clark v. Field*, 12 Vt. 485; *McLellan v. Richardson*, 13 Me. 82.

The following cases are the other way. *R. v. Blackman*, 1 Esp. 95; *R. v. Cundy*, 15 Mees. & W. 175; *R. v. Richardson*, 3 Fost. & F. 693; *Dickson v. Wilton*, 1 Id. 419; *Law v.*

*Scott*, 5 H. & J. 438; but most of these were at *nisi prius*, and all of them have been either overruled or dissented from. See *Worthington v. Scribner*, cited *supra*.

<sup>2</sup> *Blake v. Pilfield*, 1 Moo. & Rob. 198. A senator was held admissible to disclose facts which transpired in secret session after he had applied to have the injunction of secrecy removed, and that was refused. *Law v. Scott*, 5 Harr. & J. (Md.) 438. The court refused a subpoena *duces tecum* to compel a State governor to produce a paper filed with him, containing charges alleged to be libellous. *Gray v. Pentland*, 2 S. & R. (Pa.) 23; commented on and approved in *Youter v. Sanno*, 6 Watts (Pa.) 166.

<sup>3</sup> *Supra*, § 62.

<sup>4</sup> *Thompson & Merriam on Juries*, 745; *Spratt v. State*, 8 Mo. 274; *State v. Bebee*, 17 Minn. 241; *Re Pinney*, 27 Minn. 281; *State v. Gibbs*, 39 Iowa, 318; *Beam v. Link*, 27 Mo. 261; *Tindle v. Nichols*, 20 Mo. 326; *People v. Hulbut*, 4 Den. (N. Y.) 135; *Ex parte Sontag*, 5 Cr. L. Mag. 384; *Ruby v. State*, 9 Tex. App. 353.

such of the States as have statutes upon the subject, are nearly, if not quite, the same in phraseology, and are the same in meaning and effect; and an examination will show that the testimony of a member of a grand jury is admitted in two cases: (1) to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or, (2) to disclose the testimony given before them by any witness upon a charge against him of perjury.

Further than this the prohibition of the common law is not removed.<sup>1</sup>

(2) *Petit jury*. The cases as to petit jurors, also, have been already discussed,<sup>2</sup> the rule being a general one that a traverse juror cannot be heard to impeach the verdict in which he took part;<sup>3</sup> while he may sometimes be to support it, or clear himself from the charge of misconduct.<sup>4</sup> He may show his own acts while separated from his fellows,<sup>5</sup> or what evidence was given on a trial in which he was a juror.<sup>6</sup> And he may be a witness upon the trial in which he acts as a juror.<sup>7</sup>

§ 278. *Other Cases*.—An examination of the case law on the subject of privileged communications shows the existence of a general rule that no communication should be excluded, no individual should be exempt from inquiry, when the communication or the answer to the inquiry would be of importance in the conviction of crime or the acquittal of innocence, except when such exclusion is required by some grave principle of public policy. Thus, a telegraphic operator is not privileged to refuse to testify, upon a criminal trial, to the contents of a message sent by him. Such message cannot be deemed any more confidential than any other communications. The telegraphic companies cannot rightfully claim that the messages of rogues and criminals which they may

<sup>1</sup> See also, generally, *Granger v. Warrington*, 8 Ill. 299; *State v. Dec. 475*; 12 Id. 142.

*Brewer*, 8 Mo. 373; *Imlay v. Rogers*, 2 Halst. (N. J.) 347; *Croker v. State*, 1 Meigs (Tenn.) 127; *Clark v. Field*, 12 Vt. 485.

<sup>2</sup> *Supra*, § 62, subd. 2.

<sup>3</sup> *Bridgewater v. Plymouth*, 97 Mass. 382; *Williams v. Montgomery*, 60 N. Y. 648. For a full collection of

the cases on this point, see 24 Am. Dec. 475; 12 Id. 142.

<sup>4</sup> *People v. Hunt*, 59 Cal. 430; *Peck v. Brewer*, 48 Ill. 54; *Clement v. Spear*, 56 Vt. 401.

<sup>5</sup> *Heffron v. Gallupe*, 55 Me. 563.

<sup>6</sup> *Hewitt v. Chapman*, 49 Mich. 4.

<sup>7</sup> *Howser v. Com.*, 51. Pa. 54, 332; *People v. Dohring*, 59 N. Y. 374.



innocently or ignorantly transmit, should be withheld when the cause of justice renders their production necessary. The interests of the public demand that resort should be had to all available testimony which may lead to the detection and punishment of crime and to the protection of innocence.<sup>1</sup> All witnesses, other than professional men, must, when the interest of justice demands it, testify what a party told to them in confidence, and under an engagement of secrecy.<sup>2</sup> The privilege does not protect a large number of confidential communications, such as those made to confidential agents,<sup>3</sup> clerks,<sup>4</sup> bankers,<sup>5</sup> or stewards,<sup>6</sup> except in cases where the employer himself would not be obliged to disclose.

<sup>1</sup> *State v. Litchfield*, 58 Me. 267.

See, also, *Woods v. Miller*, 55 Iowa, 168; s. c., 39 Am. Rep. 170.

<sup>2</sup> *Mills v. Griswold*, 1 Root (Conn.) 383.

<sup>3</sup> *Holmes v. Comegys*, 1 Dall. (U. S.) 439; *Hoffman v. Smith*, 1 Cai. (N. Y.) 157, 159.

<sup>4</sup> *Lee v. Birrell*, 2 Campb. 337; *Webb v. Smith*, 1 Car. & P. 337.

<sup>5</sup> *Loyd v. Freshfield*, 2 Car. & P. 325.

<sup>6</sup> *Vaillant v. Dodemead*, 2 Atk. 524; *Earl of Falmouth v. Moss*, 11 Price, 455.

## CHAPTER XXIV.

### REFRESHING THE MEMORY.

§ 279. In General.

§ 280. When Memoranda or Other Writings may be referred to.

§ 281. What Writings may be used for this Purpose.

§ 282. When the Writing must be produced.

§ 283. When Witness must testify from Independent Recollection.

§ 284. When the Memoranda, etc., are themselves Evidence.

§ 285. Proper Practice where Witness is blind or cannot read.

§ 279. In General. — The rule is well settled that a witness may, under proper circumstances, have his memory respecting anything upon which he is questioned, refreshed by means of written or printed memoranda, documents, and papers.<sup>1</sup> In many cases this course is indispensable to the ascertainment of truth; such cases are, particularly, those involving the proof of accounts containing many items.<sup>2</sup> So, for obvious reasons, a witness cannot be compelled to answer whether a signature shown to him is his, unless he is permitted to examine the paper to which it is appended.<sup>3</sup> Human memory is so frail that very few witnesses are able to testify as to particular dates, numbers, quantities, and sums after any considerable lapse of time, without reference to papers or

<sup>1</sup> *Ford v. Commonwealth*, 130 Mass. 64; s. c., 39 Am. Rep. 426; *Queen v. Langton*, 22 Q. B. D. 296; *Remsey v. Duke*, 1 Morr. (Iowa) 385; *White v. Tucker*, 9 Iowa, 100; *State v. Taylor*, 3 Oreg. 10; *State v. Lyons*, 89 N. C. 568.

<sup>2</sup> *Wise v. Phoenix Ins. Co. (N. Y.)*, 4 N. East. Rep. 634; affirming 31 Hun, 87; *Lawson v. Glass*, 6 Col. 134, 135; *Wise v. Phoenix Ins. Co. (N. Y.)*, 4 N. East. Rep. 634; *Howard v. McDonough*, 77 N. Y. 592; *McCormick v. R. R. Co.*, 49 N. Y. 303; *Driggs v. Smith*, 36 N. Y. Super. Ct. Rep. 283; *Commonwealth v. Jeffs*, 132 Mass. 5; *Commonwealth v. Ford*, 130 Mass. 64; s. c., 39 Am. Rep. 426; *Davidson v. Lal-*

*lande*, 12 La. Ann. 826; *Flowers v. Downs*, 6 Id. 539; *State v. Miller*, 53 Iowa, 154, 209; *Cooper v. State*, 59 Miss. 264, 272; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *Clough v. State*, 7 Neb. 320; *McCausland v. Ralston*, 12 Nev. 196, 217; *Kent v. Mason*, 1 Bradw. (Ill.) 466, 471; *Coffin v. Vincent*, 12 Cush. (Mass.) 98; *Rambert v. Cohen*, 4 Esp. 213; *Jacob v. Lindsey*, 1 East, 227; *Kensington v. Inglis*, 8 East, 273; *Horne v. McKenzie*, 6 Cl. & F. 628; *Burton v. Plummer*, 2 Ad. & E. 341; *Rex v. Duchess of Kingston*, 20 How. St. Tr. 619.

<sup>3</sup> *Insurance Co. v. Throop*, 22 Mich. 146.

memoranda.<sup>1</sup> But with the memory thus quickened and refreshed, the witness is enabled to testify with greater clearness and accuracy than without the use of the paper, even though he remembers quite distinctly the general facts concerning which he is giving evidence. Indeed, a witness being sworn to tell the whole truth, he ought to do what is reasonable to enable him to perform that duty faithfully and sincerely, according to the spirit of his oath; and he may lawfully be required to look at memoranda or papers within his power, to aid his recollection.<sup>2</sup> But on the other hand, where the witness expresses no want of recollection, nor desire to refresh his memory, counsel cannot be allowed to place in his hands memoranda relative to the matters on which he is called to testify.<sup>3</sup> In such a case the ordinary objection to the practice — that the paper referred to operates upon the mind of the witness like a leading question — would seem to be well taken.

The manner in which a witness shall be allowed to refresh his recollection by reference to a writing must be left, to some extent, to the discretion of the presiding judge, — a discretion to be exercised with reference to the circumstances of the case, and sometimes with reference to the conduct and bearing of the witness upon the stand.<sup>4</sup> The courts are required to take great care to guard against forgery, interpolation, etc., thus preventing the abuse of the right.<sup>5</sup>

§ 280. **When Memoranda or Other Writings may be referred to.** — There are three classes of cases laid down in the books in which reference to memoranda may be made: (1) where the writing serves only to *revive* or *assist the memory* of the witness, and to bring to his mind a recollection of the facts;<sup>6</sup> (2) where the witness recollects having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet remembers that, at the time he saw

<sup>1</sup> Feeter v. Heath, 11 Wend. (N. Y.) 477, 485; McCausland v. Ralston, 12 Nev. 195.

<sup>2</sup> Chapin v. Lapham, 20 Pick. (Mass.) 467.

<sup>3</sup> Young v. Catlett, 6 Duer (N. Y.) 437; Haack v. Fearing, 5 Robt. (N. Y.) 528. S. P., Moore v. Chesley, 17 N. H. 151.

<sup>4</sup> Johnson v. Coles, 21 Minn. 108.

<sup>5</sup> Harrison v. Middleton, 11 Gratt. (Va.) 527, 544; Merrill v. Ithaca, &c. R. R. Co., 16 Wend. (N. Y.) 600; Chapin v. Lapham, 20 Pick. (Mass.) 467.

<sup>6</sup> State v. Lull, 37 Me. 246; George v. Joy, 19 N. H. 544; Harrison v. Middleton, 11 Gratt. (Va.) 527; Huff v. Bennett, 6 N. Y. 337.

it, he knew the contents to be correct;<sup>1</sup> and (3) where it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, enables him to swear to a particular fact, from the conviction of his mind on seeing a writing which he knows to be genuine; as, for instance, where a banker's clerk is shown a bill of exchange which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor of his writing anything upon the bill.<sup>2</sup>

In the two latter classes of cases, the witness must, on seeing the writing, be able to depose positively to the facts to which he is examined, although he may have no present recollection of them independently of the writing.<sup>3</sup> And in any case, a witness, after testifying to a fact from personal recollection, will not be permitted to corroborate his testimony by a written memorandum made by himself.<sup>4</sup>

§ 281. **What Writings may be used for this Purpose.**—

(1) *In general.* All original entries made in any form by the witness, for the purpose of perpetuating his memory of a particular transaction, may, as a general rule, be referred to by him in giving his testimony.<sup>5</sup> The writing need not be, itself, admissible in evidence; even an unstamped or other writing, not evidence in itself, may be used for this purpose.

<sup>1</sup> Webster v. Clark, 10 Fost. (N. H.) 245; Downer v. Rowell, 24 Vt. 343; Odiorne v. Bacon, 6 Cush. (Mass.) 185; State v. Cheek, 13 Ired. (N. C.) L. 114. And see White v. Ambler, 8 N. Y. 170.

<sup>2</sup> See R. v. St. Martin's Leicester, 2 Ad. & E. 210; State v. Colwall, 3 R. I. 132; New Haven Bank v. Mitchell, 15 Conn. 206.

<sup>3</sup> 2 Phil. Ev. \*917.

In trespass to try title a witness was allowed to refer to a plan of the land in dispute. Cundiff v. Orms, 7 Port. (Ala.) 58. See also People v. Cotta, 49 Cal. 167; Dunlap v. Berry, 5 Ill. 327.

<sup>4</sup> Wightman v. Overhiser, 8 Daly (N. Y.) 282.

<sup>5</sup> "We have words of scandal, admissions of tenants, entries by merchants' clerks, by magistrates' clerks,

entries of the receipt of sums of money, of the numbers of notes at a banker's, entries in notes by counsel, etc., of the testimony of a witness on a former trial; any entry by a bank-clerk or teller, the affidavit of a gaming transaction, the attestation of a deed, will, or other paper, the memorandum of a tender of money, including time, sum, manner, the entry of a notary or a notary's clerk, entries of admissions and settlements, etc." 2 Phil. Ev. (5 Am. Ed.) \*920n. See also Prather v. Pritchard, 26 Ind. 65; Chiappella v. Brown, 14 La. Ann. 189; Massey v. Hackett, 12 Id. 54; Welcome v. Batchelder, 23 Me. 85; Neil v. Childs, 10 Ired. (N. C.) L. 195; Columbia v. Harrison, 2 Mill (S. C.) 213; State v. Cardoza, 11 So. Car. 195.

The fact sworn to is proved by the parol testimony of the witness, not by the writing, and the latter cannot properly be said to become evidence because used by the witness for this purpose.<sup>1</sup>

(2) *By whom written.* Nor need the paper referred to have been actually written by the witness himself, if, upon consulting it, his memory is so refreshed that he can speak to the facts from a recollection of them;<sup>2</sup> while if he wrote it himself, he can, in some cases, testify to the truth of the facts, stated, even if he has no recollection of the matter.<sup>3</sup>

If he did not write it, yet he may use it to refresh his memory, if he saw the paper while the facts therein stated were fresh in his recollection, and he can say that he then knew that they were correctly stated;<sup>4</sup> otherwise if he fails to recognize the paper as a correct account of the transaction.<sup>5</sup> For where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable, as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said.<sup>6</sup>

(3) *Time of writing — date of memorandum.* As to the time when the memorandum should have been made, — whether it must be contemporaneous with the fact, or recently after the fact, or how long after, it may be made, — the decisions, as might be expected, lay down no precise rule. There seems to be no good reason for saying, that a writing is not to be allowed for the purpose of refreshing a witness's memory, unless made contemporaneously with the fact which it records;

<sup>1</sup> *Maugham v. Hubbard*, 8 Barn. & C. 14. See also *Lloyd v. Freshfield*, 2 Car. & P. 325; *Henry v. Lee*, 2 Chit. 124.

<sup>2</sup> *Duchess of Kingston's Case*, 20 How. St. Tr. 619; *Henry v. Lee*, 2 Chit. 124; *Church v. Perkins*, 3 T. R. 749; *Jacob v. Lindsay*, 1 East, 460; *Burton v. Plummer*, 2 Ad. & E. 341; *Cameron v. Blackman*, 39 Mich. 108; *State v. Lull*, 37 Me. 246.

<sup>3</sup> As where a banker's clerk is shown a bill of exchange, with his own handwriting on it, from which

he knows and can state positively, that it passed through his hands. See *infra*, § 283.

<sup>4</sup> *Coffin v. Vincent*, 12 Cush. (Mass.) 98. S. P., *State v. Collins*, 15 So. Car. 373; s. c., 40 Am. Rep. 697. Compare *Davis v. Allen*, 9 Gray (Mass.) 322.

<sup>5</sup> *Chamberlain v. Sands*, 27 Me. 458; *Morris v. Lachman* (Cal.) 8 West Coast Rep. 305.

<sup>6</sup> See also *Green v. Caulk*, 16 Md. 556.

but certainly it ought to have been made either at that period, or recently after, or at the utmost before such a length of time has elapsed, as to render it probable that the memory of the witness might have become imperfect.<sup>1</sup> The principle being adopted that a witness's memory may be assisted by a written paper or memorandum, it follows that no precise limited time can consistently be fixed, within which a writing must be shown to have been made, before it can be used by the witness. A memorandum made long after the fact, may be to some witnesses of much greater use than even a contemporaneous memorandum will be to others. The effect of a memorandum in assisting a witness will depend upon the state of his memory, and the time when the memorandum was made, — which will vary in different cases.

(4) *Copies, and particular writings.* With regard to the use of copies of original memoranda for the purpose of refreshing the memory, the adjudications afford no precise rule of procedure. Some cases apply the rule requiring the best evidence, and thus exclude the copy.<sup>2</sup> But it *seems* that if the paper used be in the nature of a duplicate original, it may be referred to.<sup>3</sup> The better opinion, however, in this country, seems to be that a copy may be used if the witness is clear and explicit in his evidence that it is truly transcribed from the original, and that the original was correctly made, and was true when made,<sup>4</sup> proof being also given that the original is lost.<sup>5</sup>

<sup>1</sup> Jones v. Stroud, 2 Car. & P. 196. In Spring &c. Ins. Co. v. Evans (15 Md. 54) five months was held too long a time; and in Schwartz v. Chickering (58 Md. 290) sixteen months was held too long. See also Kendall v. Stone, 2 Sandf. (N. Y.) 269; Tanner v. Taylor, cited in Doe v. Perkins, 3 T. R. 754; Howard v. Canfield, 5 Dowl. P. C. 417; Dupuy v. Truman, 2 Younge & Coll. 341.

<sup>2</sup> Burton v. Plummer, 2 Ad. & E. 341.

<sup>3</sup> In Folsom v. Apple River Log Driving Co. (41 Wis. 602) it is held that a witness who testifies that he made a correct written memorandum of certain facts at the time of their occurrence; that, the original being

defaced, he had, before starting from home for the place of trial, made a correct copy thereof; and that such copy, having also become defaced, he had caused another copy to be made thereof, which he knows to be correct, — may use such second copy to refresh his memory at the trial.

<sup>4</sup> Chicago &c. R. R. Co. v. Adler, 56 Ill. 344; Topham v. McGregor, 1 Car. & K. 320; compare Madigan v. Degraff, 17 Minn. 52.

<sup>5</sup> Felkins v. Baker, 6 Lans. (N. Y.) 516.

Reference to copies was allowed in Com. v. Ford, 130 Mass. 64; s. c., 39 Am. Rep. 426; Clough v. State, 7 Neb. 320; George v. Joy, 19 N. H. 544; Berry v. Jourdan, 11 Rich. (S. C.) 67.

For the application of the foregoing rules to accounts and merchants' books,<sup>1</sup> maps, plans and plats,<sup>2</sup> writing in pencil,<sup>3</sup> depositions and former testimony of the witness,<sup>4</sup> and bills of particulars and other papers in suits,<sup>5</sup> the cases cited in the notes may be consulted with profit.

§ 282. **When the Writing must be produced.** — Where, from a previous inspection of a written paper, the memory of the witness has been revived, it is not essential to the admission of his oral testimony that the writing itself should be produced in court.<sup>6</sup> The case is the same as many others in which the witness's memory is revived by reference to any past circumstance to which his attention is drawn without the aid of written memoranda. Its non-production, however, may be a matter of remark, and even though it be not in court, and the witness be not subpoenaed to produce it, the court has a discretion to require its production;<sup>7</sup> all the more so where the witness uses the paper to refresh his memory while on the stand.<sup>8</sup> It is a general rule, however, that if a witness produces any writing to assist his memory, he may be compelled to submit it to the inspection of the opposite party, to enable him to see whether it is a proper memo-

Such use of copies was refused in *Evans v. Bolling*, 8 Port. (Ala.) 546; *McCormick v. Mulvihill*, 1 Hilt. (N. Y.) 131.

<sup>1</sup> *Memphis & C. R. R. Co. v. Maples*, 63 Ala. 601; *Treadwell v. Wells*, 4 Cal. 260; *Murray v. Cunningham*, 10 Neb. 167; *Philbin v. Patrick*, 3 Abb. (N. Y.) App. Dec. 605; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Cowles v. Hayes*, 71 N. C. 230; *King v. Faber*, 51 Pa. St. 387; *Reed v. Jones*, 15 Wis. 40; *Schettler v. Jones*, 20 Wis. 412.

<sup>2</sup> *Shook v. Pate*, 60 Ala. 91; *Rippe v. Chicago & C. R. R. Co.*, 23 Minn. 18.

<sup>3</sup> *Stetson v. Godfrey*, 20 N. H. 227.

<sup>4</sup> *Atkins v. State*, 16 Ark. 568; *Burney v. Ball*, 24 Ga. 505; *Brown v. State*, 28 Ga. 199; *Harvey v. State*, 40 Ind. 516; *State v. Miller*, 53 Iowa, 154, 209; *Beaubien v. Cicotte*, 12 Mich. 459.

<sup>5</sup> *Cool v. Snover*, 38 Mich. 562; *Hudnutt v. Comstock*, 50 Mich. 596;

*State v. Able*, 65 Mo. 357; *Williams v. Miller*, 1 Wash. T. 105.

<sup>6</sup> *Kensington v. Ingles*, 8 East, 273; *Burton v. Plummer*, 2 Ad. & E. 341; *Hamilton v. Rice*, 15 Tex. 382; *Trustees of Wabash & C. Canal v. Bledsoe*, 5 Ind. 133; *State v. Cheek*, 13 Ired. (N. C.) L. 114. In *Raynor v. Norton* (31 Mich. 210) it is held that a witness who has produced and identified a memorandum which is itself admissible in evidence, may be permitted to testify from it, and such testimony is not open to the objection that the memorandum itself should be read to the jury. Where the witness merely repeats its contents, it is not material that counsel should read it, rather than the witness. To the contrary, see *Hall v. Ray*, 18 N. H. 126. And see *Harrison v. Middleton*, 11 Gratt. (Va.) 527.

<sup>7</sup> *Com. v. Lannan*, 13 Allen (Mass.) 563.

<sup>8</sup> *Tibbetts v. Sternberg*, 66 Barb. (N. Y.) 201.

random for the purpose, but he is only bound to show such parts of it as he consults to aid his memory, or such as relate to the subject of his testimony.<sup>1</sup>

Where the writing has not the effect of reviving the witness's memory, but yet enables him to speak positively to a fact, so that his testimony depends upon his inference from the writing, the writing must be produced, and his testimony is admissible as proof of the fact.<sup>2</sup>

§ 283. **When Witness must testify from Independent Recollection.** — We thus see that there are two distinct classes of cases on the question under consideration: (1) Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection. All authorities concur that if the paper produces this effect, it may be used. (2) Where the witness, after referring to the memorandum (made by himself), undertakes to swear to the fact; yet not because he remembers it, but because of his confidence in the correctness of the memorandum.

In both cases the oath of the witness is the primary substantive evidence relied upon; in the former, the oath being grounded on actual recollection, and in the latter, on the faith reposed in the verity of the memorandum, in which case, in order to judge of the credibility of the oath and of the reliance to be placed upon the testimony of the witness, all the well considered cases hold that the memorandum must be original and contemporary with the transaction, or nearly so, and must be produced in court.

There are a number of adjudications which would seem to limit the use of the memorandum in the second class of cases above mentioned, to the proof of signatures and the like, and to deny its use in such cases, where the purpose is to enable the witness to swear to facts stated in the body of the paper, as to which, even after consulting the paper, he has no personal recollection. The contention, in these cases, is that the paper must be used for the sole and distinct purpose of refreshing the memory, and not for the purpose of enabling the

<sup>1</sup> *Commonwealth v. Haley*, 13 Allen (Mass.) 587. S. P., *McKivitt v. Cone*, 30 Iowa, 455; *Tibbetts v. Sternberg*, *supra*.

<sup>2</sup> *Doe v. Perkins*, 3 T. R. 754; 1 Greenl. Ev. (14 Ed.) § 437*n* (c).



witness to gain entirely new and original information from it;<sup>1</sup> and whether a memorandum can be used for this purpose depends upon whether the witness, after examining it, can state the fact from memory;<sup>2</sup> that the witness may inspect it, provided after doing so he distinctly recollects the facts to which it relates, independent of it.<sup>3</sup> He must swear to the fact from memory,<sup>4</sup> for it is his recollection, and not the memorandum, that is the evidence.<sup>5</sup> Hence, if he cannot speak to the fact any farther than as finding it stated in the written entry, his testimony will amount to nothing. It is not enough for him to swear that he made the memorandum himself, which he believes to be true, and that he relies upon it without present recollection of the fact.<sup>6</sup> "If, after looking at the paper, the witness cannot speak from his recollection merely, his testimony, so far as he cannot speak from recollection, is inadmissible."<sup>7</sup> "If the paper fails to revive and refresh his recollection, and thus constitute his present knowledge, he cannot testify."<sup>8</sup>

<sup>1</sup> *Erie Preserving Co. v. Miller*, 32 Conn. 444; s. c., 52 Am. Rep. 607.

<sup>2</sup> *Watts v. Sawyer*, 55 N. H. 39.

<sup>3</sup> *Feeter v. Heath*, 11 Wend. (N. Y.) 477. This case is disapproved in *Halsey v. Sinsebaugh*, 15 N. Y. 487.

<sup>4</sup> *Doe v. Perkins*, 3 T. R. 409; s. c., 3 Durnf. & East. 749; *Tanner v. Taylor*, cited in last case. In the first case it is said that if the witness cannot swear from memory after inspection, and knows no more than what he finds entered in the book or paper, the original must be produced. In this case the witness testified from extracts made by himself from the original books, some entries in which were made by the witness and some by another. The witness confessed upon cross-examination that he had no memory of his own of the specific facts contained in the entries; but that the evidence that he was giving was founded altogether upon the extracts. His testimony was rejected.

<sup>5</sup> *Henry v. Lee*, 2 Chit. 124; *Hill v. State*, 17 Wis. 675. See *Pinshower v. Hanks*, 18 Nev. 99, 105.

<sup>6</sup> *Lawrence v. Barker*, 5 Wend. (N. Y.) 301, 305, relying on *Tanner*

*v. Taylor*, and *Doe v. Perkins*, *supra*. This case is disapproved in *Halsey v. Sinsebaugh*, *supra*. See *Cameron v. Blackman*, 39 Mich. 108, 109.

<sup>7</sup> *Harrison v. Middleton*, 11 Gratt. (Va.) 527, 543. "The doctrine established by the authorities seems to be that if the witness, after looking at the paper, to recall the facts, can speak from his own recollection of them, and not merely because they are stated or referred to in the paper, his evidence will be admissible, notwithstanding the manner in which his recollection was revived, and no matter when or by whom the paper was made, nor whether it be original or a copy, or an extract, nor whether referred to by the witness in court or elsewhere." Citing 4 Phil. Ev. (Cowen & Hill's, notes) part 2, p. 734.

<sup>8</sup> *Ackler v. Hickman*, 63 Ala. 494, 498; s. c., 35 Am. Rep. 54.

This view has also been taken by the Supreme Court of the United States in a very recent case. The memorandum in question had been made by the witness twenty months before its date. The witness testified that he had no present recollection of

On the other hand, the opposite view is at least as strongly fortified by judicial decisions. Thus it has been frequently laid down that where a witness has so far forgotten the facts of the transaction that he cannot recall them, even after looking at the memorandum; yet, if he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correct, and which he believed to be correct, such memorandum may be used to refresh his memory, although he has no present recollection of them.<sup>1</sup> This rule has been held to apply to the case of a notary's clerk who had forgotten his entry of notice of dishonor;<sup>2</sup> to a memorandum of a gambling transaction;<sup>3</sup> to notes of evidence of counsel;<sup>4</sup> to the entry of a bank clerk;<sup>5</sup> to the entries of charges for penalties of a town clerk;<sup>6</sup> to entries in corporate books;<sup>7</sup> and to lists made by another, which were signed and sworn to by the witness.<sup>8</sup>

The limitations upon this doctrine are believed to be as

the transaction, or no remembrance of it otherwise than as stated in the paper, but that he knew it took place because he had so stated it in the memorandum, as it was his duty to do, and because his habit was never to sign a statement unless it was true, and that he was willing to positively swear that it was true. The trial court admitted the evidence, but on appeal the Supreme Court reversed this ruling. *Maxwell v. Wilkinson*, 113 U. S. 656. See also to similar effect, *Nolin v. Parmer*, 21 Ala. 66, 70; *Memphis &c. R. R. Co. v. Maples*, 63 Ala. 601. See *State v. Collins*, 15 So. Car. 375; s. c., 40 Am. Rep. 697, for full discussion of the rule. *Murray v. Cunningham*, 10 Neb. 167, 170; *Webster v. Clark*, 30 N. H. 245, 254; *Marcy v. Schultz*, 29 N. Y. 346, 351, approved in *McCormick v. Penn. Centr. R. R.*, 49 N. Y. 315.

<sup>1</sup> *Howard v. McDonough*, 77 N. Y. 592; *Costello v. Crowell*, 133 Mass. 352, 355; *Abbott's Trial Ev.*, p. 322, par. 38; *Wernag v. C. & A. R. R. Co.* (Kansas City Court of App.), 22 Cent. L. J. XXXV. Mo. Add.

Where check-slips are made by a clerk in the ordinary course of business, showing the number of cars

shipped and the descriptive mark of the goods, they are admissible with the testimony of the clerk that they were truly made by him, and that the goods were marked and shipped as thereby indicated, although the witness has no present recollection of the transaction. *Shiedley v. State*, 23 Ohio St. 130.

Where the point is to prove protest and notice, a notary may refer to an entry in his book where it was his habit to make such entries at the happening of the event, although he has no independent recollection of the fact in question, his belief being based altogether upon such entry. *Bank of Tennessee v. Cowan*, 7 Humph. (Tenn.) 70.

<sup>2</sup> *Haige v. Newton*, 1 Rep. Const. Ct. (S. C.) 423.

<sup>3</sup> *State v. Rawls*, 2 Nott. & M. (S. C.) 334; approved in *Halsey v. Sinsebaugh*, 15 N. Y. 485, 487.

<sup>4</sup> *Clark v. Vorce*, 15 Wend. (N. Y.) 193.

<sup>5</sup> *Bank v. Boraef*, 1 Rawle (Pa.) 152.

<sup>6</sup> *Corp. of Columbia v. Harrison*, 2 Rep. Const. Ct. (S. C.) 213.

<sup>7</sup> *Mattocks v. Lyman*, 16 Vt. 113.

<sup>8</sup> *Davis v. Field*, 56 Vt. 426.

follows: It is confined to cases where the "uniform and unvarying practice" is to note the fact immediately after the event."<sup>1</sup> The memorandum must have been "presently committed to writing" by the witness,<sup>2</sup> "while the occurrences mentioned in it were fresh in his recollection;"<sup>3</sup> it must have been "written contemporaneously with the transaction,"<sup>4</sup> or "nearly so with the fact deposed to." The fact that the memoranda are made in the regular course of business is not alone sufficient, unless contemporaneous with the transaction to which it relates.<sup>5</sup> Some cases restrict the rule to entries made in the regular course of business, but others hold that it is applicable to every species of memoranda.

The rule also requires the memorandum to be an original entry and not a copy; that it be made by the witness himself, or, where it is made by another, that it be verified by the witness soon after it is made, and that he knows from his own personal knowledge of the transaction that the facts therein recorded are correct: at least it is believed that no case has extended it farther.<sup>6</sup>

§ 284. **When the Memoranda, etc., are themselves Evidence.**—In the second class of cases examined in the last section, it would seem that the memorandum referred to by the witness is, in most cases, itself admissible in evidence. Indeed, inasmuch as the witness does not testify from any independent recollection of the matter, but simply to the truth of what is stated in the memorandum, because of his faith in its authenticity and correctness, he thereby makes it evidence in the case by his oral testimony, and if his testimony is admissible, the memorandum is also in connection therewith: and so it has been held.<sup>7</sup> If, however, the witness has any recollection of

<sup>1</sup> 1 Whart. Ev. § 518, and cases cited in note 1.

<sup>2</sup> Lord Holt in *Lindwell v. Sandwell*, Comb. 445; s. c., Holt, 295.

<sup>3</sup> Lord Ellenborough in *Barrough v. Martin*, 2 Camp. 112.

<sup>4</sup> Ch. Justice Tinsdall in *Stemkeller v. Newton*, 9 Car. & P. 313.

<sup>5</sup> *Chaffee v. U. S.*, 18 Wall. (U. S.) 516; *Ins. Co. v. Weide*, 9 Id. 677; s. c., 14 Id. 375; *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 337.

<sup>6</sup> See article by Eugene McQuillen,

in 23 Central Law Journal, p. 53, where this subject is more fully treated.

<sup>7</sup> *Watson v. Walker*, 23 N. H. 471; *Webster v. Clark*, 30 N. H. 245; *Tuttle v. Robinson*, 33 N. H. 104.

A writing, made by a witness at the time of a transaction, for the purpose of stating truly its particulars, is evidence of what it contains, although the witness has forgotten the facts and circumstances. *Seavy v. Dearborn*, 19 N. H. 351; *Mims v. Sturdevant*, 36 Ala. 636.

the matters stated in the memoranda, independent thereof, the paper itself is not admissible;<sup>1</sup> nor is it admissible, in any case, to prove a fact not material to the issue.<sup>2</sup>

§ 285. **Proper Practice where Witness is blind or cannot read.** — Where the witness is blind at the time of the trial, a contemporaneous writing made by himself — in the case in hand, an unstamped receipt for money given by him — though otherwise inadmissible, may nevertheless be read to the witness to refresh his recollection.<sup>3</sup> So, also, where a paper is signed with the mark of a witness who cannot read or write, it may be read over to him for the same purpose.<sup>4</sup>

<sup>1</sup> *Meacham v. Pell*, 51 Barb. (N. Y.) 65. The rule is well stated in a recent Alabama case: "A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when, after such examination, he can testify to the facts as matter of independent recollection, but the memorandum is not thereby made evidence. If the memory of the witness is not refreshed by an examination of the memorandum so that he can testify to the facts as matter of independent recollection, but he can, nevertheless, testify that, at or about the time the memorandum was made, he knew its contents, and he knew them to be correct and true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, although he saw it made, the memorandum is not admissible evidence." *Acklen v. Hick-*

*man*, 63 Ala. 494; s. c., 35 Am. Rep. 54.

<sup>2</sup> *Wolfborough v. Alton*, 18 N. H. 185.

For other cases holding the memoranda inadmissible, see *Olds v. Powell*, 10 Ala. 393; *Rutherford v. Branch Bank at Mobile*, 14 Ala. 92; *Commonwealth v. Jeffs*, 132 Mass. 5; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Bissell v. Russell*, 23 Hun (N. Y.) 659; *Selover v. Rexford*, 52 Pa. St. 308.

See also a learned discussion of the earlier cases in note 587, 2 Phil. Ev. 5th Amer. Ed.

<sup>3</sup> *Per* Lord Tenderden, in *Catt v. Howard*, 3 Stark. 3.

<sup>4</sup> *Commonwealth v. Fox*, 7 Gray (Mass.) 585, where, however, it is held that it should not be read in the presence of the jury, but that the witness should withdraw with one of the counsel on each side, and have it read to him by them, without comment.

PART IV.



OPINIONS.



## PART IV.—OPINIONS.

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### CHAPTER XXV.

#### OPINIONS OF NON-PROFESSIONAL WITNESSES.

§ 286. The General Rule excluding Opinions.

§ 287. Scope and Extent of the Rule.

§ 288. Its Limits and Exceptions.

§ 289. Opinions as to Value.

§ 290. Opinions as to Amount of Damage.

§ 291. Opinions as to Sanity and Mental Capacity.

§ 286. **The General Rule excluding Opinions.**—It is an elementary principle of the law of evidence that the opinions of non-professional witnesses are not admissible, except in a few special cases, resting upon peculiar circumstances.<sup>1</sup> Such a witness must testify to facts themselves, and he will not be allowed to testify to mere conclusions or deductions from facts;<sup>2</sup> or his impressions, suppositions, or understanding of a matter.<sup>3</sup> To deduce conclusions from facts proved is the

<sup>1</sup> *Berry v. State*, 10 Ga. 511; *Mobile &c. Ins. Co. v. McMillan*, 31 Ala. 711; *Robertson v. Stark*, 15 N. H. 109; *Spear v. Richardson*, 34 N. H. 428; *Gibson v. Williams*, 4 Wend. (N. Y.) 320; *Zachary v. Swanger*, 1 Oreg. 92; *Carr v. Nothern Liberties*, 35 Pa. St. 324; *Lester v. Pittsford*, 7 Vt. 161.

<sup>2</sup> *Gregory v. Walker*, 38 Ala. 26; *Perry v. Graham*, 18 Ala. 822; *Dickerson v. Johnson*, 24 Ark. 251; *Jones v. Childs*, 2 Dana (Ky.) 25; *McConnell v. New Orleans*, 15 La. Ann. 410; *Sparr v. Wellman*, 11 Mo. 230; *Morehouse v. Mathews*, 2 N. Y. 514; *Crounse v. Fitch*, 14 Abb. (N. Y.) Pr. 346; *Bailey v. Pool*, 13 Ired. (N. C.) L. 404;

*Albatross v. Wayne*, 16 Ohio, 513; *Given v. Albert*, 5 Watts & S. (Pa.) 333; *Jones v. Hatchett*, 14 Ala. 743; *Andrews v. Jones*, 10 Ala. 460; *Mealing v. Pace*, 14 Ga. 596; *Keener v. State*, 18 Ga. 194; *Dawson v. Callaway*, Id. 573; *Iglehart v. Jernegan*, 16 Ill. 513; *Selden v. Bank of Commerce*, 3 Minn. 166; *Torrance v. Hurst*, 1 Miss. (Walk.) 403; *Paige v. Hazard*, 5 Hill (N. Y.) 603; *Woodin v. People*, 1 Park. (N. Y.) Cr. 464; *Haynie v. Baylor*, 18 Tex. 498; *Cooper v. State*, 23 Tex. 331.

<sup>3</sup> *Chaires v. Brady*, 10 Fla. 133; *Hall v. State*, 40 Ala. 698; *Lowry v. Harris*, 12 Minn. 255; *Lewis v. Bacon*, 41 Me. 448; *Wetherell v. Patterson*,

province of the jury, not that of the witness.<sup>1</sup> Thus, the testimony of a witness that he understands that a person is dead, is not sufficient evidence of his death.<sup>2</sup> So, the fact that "he considered" a certain transaction a loan, is not evidence;<sup>3</sup> nor can he state that a party was "largely embarrassed with debts," that being a statement of conclusions, and not of facts.<sup>4</sup>

§ 287. **Scope and Extent of the Rule.**—(1) *In general.* The admissibility of opinion evidence, whether of experts or ordinary witnesses, should be confined to cases in which, from the very nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and justice.<sup>5</sup> If the jury may be supposed to have the same degree of knowledge of the subject as the witness, his opinion is in no case admissible.<sup>6</sup> So held of the opinion of a witness as to the age of a person, based entirely upon his appearance.<sup>7</sup> Such evidence is an invasion of the province of the jury.<sup>8</sup> Thus a witness cannot be heard to give an

31 Mo. 458; *Hibbard v. Russell*, 16 N. H. 410; *Braley v. Braley*, Id. 426; *Ives v. Hamlin*, 5 Cush. (Mass.) 534; *Elliott v. Sanderson*, 16 Mo. 482.

<sup>1</sup> *Largan v. Central R. R. Co.*, 40 Cal. 272; *Gavisk v. Pacific R. R. Co.*, 49 Mo. 274.

<sup>2</sup> *Tibbetts v. Flanders*, 18 N. H. 284.

<sup>3</sup> *Saltmarsh v. Bower*, 34 Ala. 613.

<sup>4</sup> *Massey v. Walker*, 10 Ala. 288; *Nuckalls v. Pinkston*, 38 Ala. 615; *Babcock v. Middlesex &c. Bank*, 28 Conn. 302.

<sup>5</sup> *Parker v. Chambers*, 24 Ga. 518.

In speaking of the competency as evidence of the opinion of non-professional witnesses, the Supreme Court of Massachusetts says: "The competency of this evidence rests upon two necessary conditions: first, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and second, that the facts upon which the witness is called to express his opinion are such as men in general are

capable of comprehending and understanding. When these conditions have been complied with or fulfilled in a given case, the court must then pass upon the question, whether the witness had the opportunity and means of inquiry, and was careful and intelligent in his observation and examination. It is not the mere qualification of the witness, but the extent and thoroughness of his examination into the specific facts to which the inquiry relates, and the general character of those facts, as affording to one, having his opportunity to judge, the requisite means to form an opinion. The same rule applies to this class of testimony, as to the testimony of experts, whether the expert is competent by his study or business, and whether he has qualified himself to testify, or had proper opportunity to examine, are preliminary questions for the court." *Com. v. Sturtevant*, 117 Mass. 122, 137.

<sup>6</sup> *Sowers v. Dukes*, 8 Minn. 23; *Cooper v. State*, 23 Tex. 331.

<sup>7</sup> *Morse v. State*, 6 Conn. 9.

<sup>8</sup> *Bluitt v. State*, 12 Tex. App. 39; *Eaton v. Woolly*, 28 Wis. 628.



opinion that an express company held itself out as a common carrier;<sup>1</sup> or that a fire probably commenced in a certain part of a building;<sup>2</sup> or as to whether a conversation carried on at one place (not overheard by him) could be heard at another.<sup>3</sup>

To allow a witness to give an opinion upon the very issue, upon the question referred to the jury for decision, is error calling for reversal.<sup>4</sup> Nor can he be allowed to testify as to his opinion, based upon the testimony he may have heard given in the cause, unless it is in a matter of skill, and the witness is an expert.<sup>5</sup> In the case of an ordinary, non-expert witness, it is absolutely essential that he should have had the means of personal observation, and should have acquired a personal knowledge of the facts, as distinguished from a knowledge acquired from the testimony of others.<sup>6</sup>

(2) *Questions of science, skill, or trade.* Where the inquiry is into a subject-matter, the nature of which requires some peculiar habit, study, or scientific knowledge to enable one to understand it and to form a correct judgment thereon, the opinion of a non-expert witness is not admissible.<sup>7</sup> Thus, an ordinary witness cannot testify that a house might have been saved from destruction by fire, if a certain aperture had been closed;<sup>8</sup> or as to the state of repair of a highway, or bridge, some months prior to an accident;<sup>9</sup> or the capacity of a locomotive to draw a train;<sup>10</sup> or whether a certain boot made a certain footprint.<sup>11</sup> So, also, an ordinary witness cannot be allowed to testify as to what is meant by a "permanent policy" of insurance;<sup>12</sup> or that a wound inflicted upon a horse was sufficient to cause its death;<sup>13</sup> or that he had seen writing extracted by the use of chemicals from a piece of

<sup>1</sup> United States Express Co. v. Anthony, 5 Kan. 490.

<sup>2</sup> Wood v. Chicago &c. R. Co., 40 Wis. 582.

<sup>3</sup> Hardenburgh v. Cockroft, 5 Daly (N. Y.) 79. S. P., Wheeler v. Blandin, 22 N. H. 167; 24 Id. 168.

<sup>4</sup> Hathaway v. Brown, 22 Minn. 214.

<sup>5</sup> Daniels v. Mosher, 2 Mich. 183; Cincinnati &c. Ins. Co. v. May, 20 Ohio, 211; Paige v. Hazard, 5 Hill (N. Y.) 604.

<sup>6</sup> Eyerman v. Sheehan, 52 Mo. 221; Sydleman v. Beckwith, 43 Conn. 9.

<sup>7</sup> Wagner v. Jacoby, 26 Mo. 530; Linn v. Sigsby, 67 Ill. 75; Luning v. State, 1 Chand. (Wis.) 178.

<sup>8</sup> Gibson v. Hatchett, 24 Ala. 201.

<sup>9</sup> Hutchinson v. Methuen, 1 Allen (Mass.) 33; Bliss v. Wilbraham, 8 Allen (Mass.) 564; Crane v. Northfield, 33 Vt. 124.

<sup>10</sup> Sisson v. Cleveland &c. R. R. Co., 14 Mich. 489.

<sup>11</sup> Clough v. State, 7 Neb. 320.

<sup>12</sup> First Baptist Church v. Brooklyn &c. Ins. Co., 28 N. Y. 153.

<sup>13</sup> Harris v. Panama R. R. Co., 3 Bosw. (N. Y.) 77.

paper which he held in his hand at the trial.<sup>1</sup> Nor can a witness ignorant of anatomy give his opinion as to the sex of a person from an examination of the skeleton.<sup>2</sup> In all these, and many other cases to be examined later on,<sup>3</sup> the special knowledge of an expert is required.

(3) *Purpose or intention.* As a general rule a witness should not be permitted to express an opinion as to the intent, motive, or purpose of another person in doing a given act or making a given statement<sup>4</sup>—as that it was or was not the intention of the deceased to kill the prisoner;<sup>5</sup> or that the conduct of the parties to an action for breach of promise, evinced a mutual attachment;<sup>6</sup> or that the grantee in a deed had or had not an undue influence over the grantor;<sup>7</sup> or that money in the possession of a prisoner was “obtained honestly”;<sup>8</sup> or as to defendant’s purpose in visiting plaintiff’s wife in her husband’s absence;<sup>9</sup> or as to the intent of the partners of the witness in making an assignment for benefit of creditors.<sup>10</sup> But it seems that it is proper to interrogate a witness who observed the operations of a crowd who followed and killed a person, whether he discovered any difference of purpose among those forming the crowd.<sup>11</sup> But the true rule undoubtedly is, that if the witness had no better opportunity of judging of the intent or purpose of the act in question, than that afforded the jury by the narration of the facts of the transaction, his opinion as to such intent or purpose should be excluded.<sup>12</sup>

(4) *Effect or result of words or acts.* A witness who testifies in regard to conversations had with a party, must state either the language used, or the substance thereof; the *im-*

<sup>1</sup> Otey v. Hoyt, 2 Jones (N. C.) L. 70.

<sup>2</sup> Wilson v. State, 41 Tex. 320.

<sup>3</sup> *Infra*, § 292. See also Moulton v. Scruton, 39 Me. 287; Holden v. Robinson Mfg. Co., 65 Me. 215.

<sup>4</sup> Clement v. Cureton, 36 Ala. 120.

<sup>5</sup> Hawkins v. State, 25 Ga. 207; Hudgins v. State, 2 Ga. 173.

<sup>6</sup> Leckey v. Bloser, 24 Pa. St. 401.

<sup>7</sup> Dean v. Fuller, 40 Pa. St. 474.

<sup>8</sup> Johnson v. State, 35 Ala. 370.

<sup>9</sup> Cox v. Whitefield, 18 Ala. 738.

<sup>10</sup> Spaulding v. Strang, 36 Barb. (N. Y.) 310, where, however, it is said

he may testify to his own intent in so doing. S. P., Snow v. Paine, 114 Mass. 510. But it has been held that the writer of a letter who is not a party to the action cannot be permitted to testify as to the sense in which he used a word occurring therein. Harrison v. Kirke, 38 N. Y. Superior Ct. 396. Compare Howe Machine Co. v. Souder, 58 Ga. 64.

<sup>11</sup> Brennan v. People, 15 Ill. 511.

<sup>12</sup> State v. Garvey, 11 Minn. 154. See also Wallis v. Randall, 81 N. Y. 164; Debbs v. State, 43 Tex. 650.

*pression* left upon his mind by the conversation is not evidence;<sup>1</sup> nor is his opinion as to whether language used was calculated to induce one to sign an instrument through fear.<sup>2</sup> So, whether language was used by the prisoner in a manner to disturb the family of the witness, is mere matter of opinion.<sup>3</sup>

For analogous reasons, a witness cannot state his opinion as to the effect of particular charges in an account;<sup>4</sup> or the effect upon the credit of a firm, of the suing out of an attachment against its property;<sup>5</sup> or the probable effect of the construction of a railroad over a certain piece of land;<sup>6</sup> or that of a husband's conduct towards his wife.<sup>7</sup> But this rule does not apply where the witness merely details the nature and extent of the consequences of an act, and states only facts within his knowledge, and not matters of opinion requiring professional skill in their just formation.<sup>8</sup>

(5) *Various illustrations of the extent of the rule.* It may be stated as a general proposition that an unskilled witness cannot be heard to express an opinion as to the existence or prevalence of a certain disease in a particular locality,<sup>9</sup> or that a particular person is afflicted with a certain disease,<sup>10</sup> and he (the witness) thought he would die.<sup>11</sup> So, also, a non-expert witness cannot testify that a particular woman was once in a state of pregnancy.<sup>12</sup> And the rule which excludes

<sup>1</sup> *Elbin v. Wilson*, 33 Md. 135; *Cutler v. Carpenter*, 1 Cow. (N. Y.) 81.

<sup>2</sup> *Johnson v. Ballew*, 2 Port. (Ala.) 29. S. P., *Law v. Scott*, 5 Har. & J. (Md.) 438, where, however, it is said the witness may testify as to the effect of hearing the words upon his own subsequent action.

<sup>3</sup> *Lumbkin v. State*, 12 Tex. App. 341. S. P., *People v. Tamkin*, 62 Cal. 468.

<sup>4</sup> *United States v. Willard*, 1 Paine (U. S.) 539.

<sup>5</sup> *Donnell v. Jones*, 13 Ala. 490.

<sup>6</sup> *Milwaukee &c. R. R. Co. v. Eble*, 4 Chand. (Wis.) 72.

<sup>7</sup> *Richards v. Richards*, 37 Pa. St. 225. But see *Panton v. Norton*, 18 Ill. 496.

<sup>8</sup> *Creed v. Hartman*, 8 Bosw. (N. Y.) 123.

<sup>9</sup> *Evans v. People*, 12 Mich. 27.

<sup>10</sup> *Lush v. McDaniel*, 13 Ired. (N. C.) 485; *Thompson v. Bertrand*, 23 Ark. 730; *Chicago &c. R. R. Co. v. George*, 19 Ill. 510, 516; *Shawneetown v. Mason*, 82 Ill. 337, 339. But see *infra*, § 288.

<sup>11</sup> *Blackman v. Johnson*, 35 Ala. 252.

In one case it is said that "no witness, medical or otherwise, can be allowed to give testimony from his observation concerning the nature of a person's illness or its causes, without proof both of a sufficient examination, and such knowledge or experience as will qualify him to offer an opinion." *People v. Olmstead*, 30 Mich. 434. S. P., *McLean v. State*, 16 Ala. 672; *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281.

<sup>12</sup> *Boies v. M'Allister*, 12 Me. 308.

the "conclusion" of a witness prohibits him from giving his opinion upon matters of legal or moral obligation.<sup>1</sup>

§ 288. **Limits and Exceptions to the Rule.**—The rule we are considering is subject to well recognized exceptions, and these exceptions are "not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning; but include the evidence of common observers, testifying to the results of their observations made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. . . . What is thus given by a witness is not a mere opinion, but a conclusion of fact to which his judgment, observation, and common knowledge have led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general."<sup>2</sup> But the opinion must be founded on the personal observation of the witness, not upon the testimony of others or on hypothetical cases put.<sup>3</sup>

Resulting from this necessity, the opinions of ordinary witnesses are often received as the only way of arriving at any accurate conclusion as to the facts involved in the issue. Such witnesses may therefore, in many cases, give their opinions as to the identity of a person or thing;<sup>4</sup> or the appear-

<sup>1</sup> For instances of the exclusion of opinions involving conclusions of law or fact, see *Winter v. Stock*, 29 Cal. 437; *Meredith v. Picket*, 9 Wheat. (U. S.) 574; *Lindauer v. Delaware Ins. Co.*, 13 Ark. 461; *McClintock v. Lara*, 23 Ark. 215; *Banks v. Gidrot*, 19 Ga. 421; *Massure v. Noble*, 11 Ill. 531; *Wiggins v. Holley*, 11 Ind. 2; *Williams v. Dewitt*, 12 Ind. 309; *Danforth v. Carter*, 4 Iowa, 230; *Williams v. Soutter*, 7 Iowa, 435; *Smith v. Commonwealth*, 6 B. Mon. (Ky.) 21; *Marcy v. Sun Ins. Co.*, 11 La. Ann. 748; *Bennett v. Clemence*, 6 Allen (Mass.) 10; *First Nat. Bank v. Reed*, 36 Mich. 263; *Roehl v. Baasen*, 8 Minn. 26; *Dunlap v. Hearn*, 37 Miss. 471; *Atwood v. Meredith*, 37 Miss. 635; *Young v. Power*, 41 Miss. 197; *Dublin Case*, 38 N. H. 459; *People v. Lacoste*, 37 N. Y. 192; *Woodburn v. Farmers' &c. Bank*, 5 Watts

& S. (Pa.) 447; *Fisher v. Deibert*, 54 Pa. St. 460; *Clough v. Patrick*, 37 Vt. 421.

<sup>2</sup> *Commonwealth v. Sturtevant*, 117 Mass. 122. S. P., *Sydleman v. Beckwith*, 43 Conn. 9 (reviewing many cases); *Eyerman v. Sheehan*, 52 Mo. 221. Compare *Taylor v. Town of Monroe*, 43 Conn. 36.

<sup>3</sup> *Sydleman v. Beckwith*, *supra*.

<sup>4</sup> *Gentry v. M'Minnis*, 3 Dana (Ky.) 382; *Com. v. Williams*, 105 Mass. 62; *State v. Babb*, 76 Mo. 501; *King v. N. Y. Cent. &c. R. R. Co.*, 72 N. Y. 607; *Irwin v. Bear*, 4 Yeates (Pa.) 262; *Page v. Commonwealth*, 27 Gratt. (Va.) 954. But for qualifications of this rule, see *Whizenant v. State*, 71 Ala. 383; *Gorham v. Gorham*, 41 Conn. 242; *Goodwyn v. Goodwyn*, 20 Ga. 600; *People v. Williams*, 17 N. Y. Week. Dig. 356. In the case of identity the better opinion seems not

ance of a person as respects sobriety or intoxication;<sup>1</sup> or whether such person is "a man of known intemperate habits;"<sup>2</sup> or appears to be sick or in good health;<sup>3</sup> or as to the necessity of medical services in a particular case, and the length of time such necessity continued.<sup>4</sup> So an ordinary witness may testify as to the appearance of a wound—that it was inflamed and tender to the touch—and describe its outward effect upon the victim;<sup>5</sup> or give his opinion in connection with the facts, as to the soundness or habits of a horse or other animal, with the condition or disposition of which he is acquainted;<sup>6</sup> or as to time, duration, distance, dimension, velocity, etc;<sup>7</sup> or the character or kind of liquor

to require a statement of the facts upon which the opinion is based, for the identification may be by the mere expression of the countenance, which cannot be described; and the witness may be correct although unable to describe a single feature, or to give the color of the hair, or of the eyes, or the full particulars of the dress.\*

<sup>1</sup> *Dimick v. Downs*, 82 Ill. 370; *Castner v. Sliker*, 4 Vr. (N. J.) 95; *affirmed*, Id. 507.

<sup>2</sup> *Stanley v. State*, 26 Ala. 26. But see a later case directly to the contrary (*Smith v. State*, 55 Ala. 1) where, however, whether the person was "a man of known intemperate habits" was the direct question at issue, which fact would seem to distinguish the two cases.

In a Georgia case, the facts on which such opinion is based are required in connection with the opinion, and probably this requirement is general. *Peirce v. State*, 53 Ga. 365. See also *Aurora v. Hillman*, 90 Ill. 61.

<sup>3</sup> *Milton v. Rowland*, 11 Ala. 732; *Bennett v. Fail*, 26 Ala. 605; *Barker v. Coleman*, 35 Ala. 221; *Blackman v. Johnson*, Id. 252; *Stone v. Watson*, 37 Ala. 279; *Higbie v. Guardian Mutual Life Ins. Co.* 53 N. Y. 603; s. c., 66 Barb. 462; *Shawneetown v. Mason*, 82 Ill. 337; *Brown v. Lester*, Ga. Dec. Pt. I. 77; *Townsdin v. Nutt*,

19 Kan. 282. See *Thompson v. Bertrand*, 23 Ark. 730. To the contrary, see *Bell v. Morrisett*, 6 Jones (N. C.) L. 178; unless he testifies to facts showing the opinion to be true. *Seibles v. Blackwell*, 1 McMull. (S. C.) 56; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535.

<sup>4</sup> "But, in a question of this kind, any person of intelligence is capable of judging of the necessity of medical advice and services. It is universally acted upon by all classes of mankind, and we are not disposed to lay down a rule that none but a physician is competent to prove that a person is sick, or so sick as to require medical advice." *Chicago &c. R. R. Co. v. George*, 19 Ill. 510. See also *Parker v. Boston &c. Steamboat Co.*, 109 Mass. 449; *distinguishing Ashland v. Marlborough*, 99 Id. 48.

<sup>5</sup> *Craig v. Gerrish*, 58 N. H. 513.

<sup>6</sup> *Sydleman v. Beckwith*, 43 Conn. 9; *Campbell v. State*, 23 Ala. 44; *Norton v. Moore*, 3 Head (Tenn.) 480. See also *Willis v. Quimby*, 11 Fost. (N. H.) 485; *Whittier v. Franklin*, 46 N. H. 23; *Spear v. Richardson*, 34 N. H. 428; *State v. Shinborn*, 46 N. H. 497.

<sup>7</sup> *State v. Folwell*, 14 Kans. 105; *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143; *Hackett v. Boston &c. R. R. Co.*, 35 Id. 390; *Detroit &c. R. R. Co. v. Van Steinburg*, 17 Mich. 99.

\* See *Sydleman v. Beckwith*, 43 Conn. 13.

sold or drank;<sup>1</sup> or the age, appearance, or nationality of a particular individual.<sup>2</sup>

Again, ownership,<sup>3</sup> and possession,<sup>4</sup> solvency or insolvency,<sup>5</sup> care or negligence,<sup>6</sup> the state of the weather,<sup>7</sup> quantity and contents,<sup>8</sup> and numberless other topics of common observation, have been held to involve questions upon which the opinions of non-professional and unskilled witnesses are admissible in evidence, especially when accompanied with a statement of the facts forming the bases of such opinions.<sup>9</sup>

§ 289. **Opinions as to Value.**—The opinions of ordinary witnesses acquainted with the value of property are often admitted from necessity, even though their knowledge is not the result of peculiar skill in any particular branch of business, or department of science.<sup>10</sup> “These opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training, or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable evidence of the fact to be proved.”<sup>11</sup> But in all cases, even where the wit-

<sup>1</sup> *Commonwealth v. Timothy*, 8 Gray (Mass.) 480. See also *State v. Miller*, 53 Iowa, 84.

<sup>2</sup> *Foltz v. State*, 33 Ind. 215; *Morse v. State*, 6 Conn. 9; *De Witt v. Baily*, 17 N. Y. 344; *Benson v. McFadden*, 50 Ind. 431; *Kansas Pacific R. R. Co. v. Miller*, 2 Colo. 442; *Culver v. Dwight*, 6 Gray (Mass.) 444.

<sup>3</sup> *Nelson v. Iverson*, 24 Ala. 9.

<sup>4</sup> *Jones v. Merrimack River Lumber Co.*, 31 N. H. 381.

<sup>5</sup> Provided the opinion is accompanied by the facts upon which it is based. *Crawford v. Andrews*, 6 Ga. 244; *Royall v. McKenzie*, 25 Ala. 363; *Riggins v. Brown*, 12 Ga. 271; *Blanchard v. Mann*, 1 Allen (Mass.) 433; *Thompson v. Hall*, 45 Barb. (N. Y.) 214; *Iselin v. Peck*, 2 Robt. (N. Y.) 629; *Sherman v. Blodgett*, 28 Vt. 149; *Richardson v. Hitchcock*, Id. 757; *Reed v. Timmins*, 52 Tex. 84.

<sup>6</sup> *Gahagan v. Boston &c. R. R. Co.*, 1 Allen (Mass.) 187; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Couch v. Watson Coal Co.*, 46 Iowa, 17.

But see *Sterling Bridge Co. v. Pearl*, 80 Ill. 251.

<sup>7</sup> *Curtis v. Chicago &c. R. R. Co.*, 18 Wis. 312.

<sup>8</sup> *Woodward v. Gates*, 38 Ga. 205; *Frantz v. Ireland*, 66 Barb. (N. Y.) 386; *Townsend v. Brundage*, 4 Hun (N. Y.) 264; *Sickles v. Gould*, 51 How. (N. Y.) Pr. 22.

<sup>9</sup> For further illustrations, see *Clinton v. Howard*, 42 Conn. 294; *Innis v. The Senator*, 4 Cal. 5; *Commonwealth v. Sturtivant*, 117 Mass. 122; *Commonwealth v. Dorsey*, 103 Mass. 412; *Commonwealth v. Pope*, 103 Mass. 440; *Patrick v. The J. Q. Adams*, 19 Mo. 73; *State v. Morris*, 84 N. C. 756; *State v. Reitz*, 83 N. C. 634; *State v. Folwell*, 14 Kans. 105; *State v. Shinborn*, 46 N. H. 497.

<sup>10</sup> *Swan v. Middlesex*, 101 Mass. 173; *Wyman v. Lexington &c. R. R. Co.*, 13 Metc. (Mass.) 316.

<sup>11</sup> *Swan v. Middlesex*, *supra*. Wharton, in his work on Evidence (§ 447) says: “Two essentials, therefore, exist to a proper estimate of value: *First*.

ness is claimed to be an expert, some foundation must be laid for the introduction of his opinion, by showing that he has had the means to form an intelligent opinion, "derived from an adequate knowledge of the nature and kind of property in controversy, and of its value,"<sup>1</sup> and that, too, at the particular market in question.<sup>2</sup> But it is held that it is not always necessary that a witness, in speaking of value, should speak only from actual observation. In cases where, from the destruction of personal property, no witness can be produced who has had an opportunity to examine, and be conversant with the value, the rule which allows the next best evidence to be produced applies; and the value may be ascertained from persons conversant with property of that nature, after they are made acquainted with its condition by the testimony of others.<sup>3</sup>

A knowledge of the intrinsic properties of the thing. *Secondly*. A knowledge of the state of the markets. As to such intrinsic properties as are occult, and out of the range of common observers, experts are required to testify; as to the properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify."

<sup>1</sup> *Whitney v. City of Boston*, 98 Mass. 315; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133.

<sup>2</sup> *Greeley v. Stilson*, 27 Mich. 153.

<sup>3</sup> *Orr v. New York*, 64 Barb. (N. Y.) 106. But see *Toledo &c. R. Co. v. Smith*, 25 Ind. 288.

In *Bedell v. Long Island R. R. Co.* (44 N. Y. 367) it is said that there is no rule of law, and there can be none, defining how much a witness shall know of property before he can be permitted to give his opinion as to its value. He must have some acquaintance with it, sufficient to enable him to form some estimate of its value, and then it is for the jury to determine how much weight such estimate is entitled to.

The following decisions pass upon the admissibility of opinions of ordinary witnesses as to the value of personal property: *Ward v. Reynolds*,

32 Ala. 384; *Rawles v. James*, 49 Ala. 183; *Thatcher v. Kaucher*, 2 Col. T. 698; *Butler v. Mehrling*, 15 Ill. 488; *Ohio &c. R. R. Co. v. Irwin*, 27 Ill. 178; *Same v. Taylor*, Id. 207; *Anson v. Dwight*, 18 Iowa, 241; *Doane v. Garretson*, 24 Iowa, 351; *Haskins v. Hamilton Ins. Co.*, 5 Gray (Mass.) 432; *Beecher v. Denniston*, 13 Id. 354; *Davis v. Elliott*, 15 Id. 90; *Kermott v. Ayer*, 11 Mich. 181; *Continental Ins. Co. v. Horton*, 28 Id. 173; *Thompson v. Moiles*, 46 Id. 42; *Brackett v. Edgerton*, 14 Minn. 174; *Krouschable v. Knoblauch*, 21 Id. 56; *Burger v. Northern Pacific R. R. Co.*, 22 Id. 343; *Seyforth v. St. Louis &c. R. R. Co.*, 52 Mo. 449; *Whitfield v. Whitfield*, 40 Miss. 352; *Beard v. Kirk*, 11 N. H. 397; *Low v. Connecticut &c. R. R. Co.*, 45 N. H. 370; *Watson v. Bauer*, 4 Abb. (N. Y.) Pr. n. s. 273; *Rogers v. Ackerman*, 22 Barb. (N. Y.) 134; *Smith v. Hill*, Id. 656; *Nellis v. McCarn*, 35 Id. 115; *Wells v. Kelsey*, 38 Id. 242; *Seamans v. Smith*, 46 Id. 320; *Brown v. Hoburger*, 52 Id. 15; *Harris v. Panama R. R. Co.*, 3 Bosw. (N. Y.) 7; *Joy v. Hopkins*, 5 Den. (N. Y.) 84; *Thorn v. Couchman*, 28 How. (N. Y.) Pr. 95; *Todd v. Warner*, 48 Id. 234; *Kerr v. McGuire*, 28 N. Y. 446; *Merrill v. Grinnell*, 30 N. Y. 594; *Teerpenning v. Corn &c.*

§ 290. **Opinions as to Amount of Damage.**—As a general rule it is not proper to ask a witness to state the amount of damages caused by the acts of defendant for which suit is brought. The witness should state the facts, and the jury should estimate the damages.<sup>1</sup> Still, inasmuch as a witness may give his opinion as to the value of a thing injured both before and after the injury, this is the same thing, practically, as if he testified to the amount of damage done.<sup>2</sup> In some

*Ins. Co.*, 43 N. Y. 279; *Tiffany v. Lord*, 65 N. Y. 310; *Hood v. Maxwell*, 1 W. Va. 219; *Noonan v. Ilsley*, 22 Wis. 27.

The following cases treat of opinions upon the question of the value of land: *Illinois &c. R. R. Co. v. Von Horn*, 18 Ill. 257; *Evansville R. R. Co. v. Cochran*, 10 Ind. 560; *Sinclair v. Roush*, 14 Ind. 450; *Crouse v. Holman*, 19 Ind. 30; *Dalzell v. Davenport*, 12 Iowa, 437; *Sanford v. Shepard*, 14 Kan. 228; *Clark v. Rockland Water Power Co.*, 52 Me. 68; *Dwight v. County Commr's*, 11 Cush. (Mass.) 201; *Russell v. Horn Pond Branch R. R. Co.*, 4 Gray (Mass.) 607; *West Newbury v. Chase*, 5 Id. 421; *Flint v. Flint*, 6 Allen (Mass.) 34; *Rand v. Newton*, Id. 38; *Fowler v. Middlesex*, Id. 92; *Whitman v. Boston &c. R. R.*, 7 Id. 313; *Wesson v. Washburn Iron Co.*, 13 Id. 95; *Whitney v. Boston*, 98 Mass. 312; *Swan v. Middlesex Co.*, 101 Id. 173; *Hawkins v. Fall River*, 119 Id. 94; *Stone v. Covell*, 29 Mich. 579; *Rochester v. Chester*, 3 N. H. 349; *Peterboro' v. Jaffrey*, 6 Id. 462; *Westlake v. St. Lawrence Ins. Co.*, 14 Barb. (N. Y.) 206; *Rochester &c. R. R. Co. v. Budlong*, 6 How. (N. Y.) Pr. 467; 10 Id. 289; *Clark v. Baird*, 9 N. Y. 183; *Van Densen v. Young*, 20 N. Y. 9; *Robertson v. Knapp*, 35 N. Y. 91; *Cleveland &c. R. R. Co. v. Ball*, 5 Ohio St. 568; *Brown v. Corey*, 43 Pa. St. 495; *Pennsylvania &c. R. R. Co. v. Bunnell*, 81 Pa. St. 414; *Hanover Water Co. v. Ashland Iron Co.*, 84 Id. 279; *Buffum v. New York &c. R. R. Co.*, 4 R. I. 221; *Means v. Means*, 7 Rich. (S. C.) 533.

The admissibility of opinions as to the value of services rendered and

materials furnished will be found discussed in *Parker v. Parker*, 33 Ala. 459; *Hastings v. Uncle Sam*, 10 Cal. 341; *Eagle &c. Mf'g Co. v. Browne*, 58 Ga. 240; *Hough v. Cook*, 69 Ill. 581; *Chamness v. Chamness*, 53 Ind. 301; *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508; *Kendall v. May*, 10 Allen (Mass.) 59; *Elfelt v. Smith*, 1 Minn. 125; *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Lewis v. Trickey*, 20 Id. 387; *Lamoure v. Caryl*, 4 Den. (N. Y.) 370; *McCullem v. Seward*, 62 N. Y. 316; *Mercer v. Vose*, 67 Id. 56; s. c., 40 Superior, 218; *Forbes v. Howard*, 4 R. I. 364; *Gonzales College v. McHugh*, 21 Tex. 256; *Carroll v. Welch*, 26 Tex. 147.

And opinions of ordinary witnesses in respect to the value of professional services are fully treated of in *Hait v. Vidal*, 6 Cal. 56; *Covey v. Campbell*, 52 Ind. 157; *Ottawa University v. Parkinson*, 14 Kan. 159; *Smith v. Kobbe*, 59 Barb. (N. Y.) 289; *Chessman v. Merkel*, 3 Bosw. (N. Y.) 402.

<sup>1</sup> *Bissell v. West*, 35 Ind. 54.

<sup>2</sup> *Morehouse v. Mathews*, 2 N. Y. 514, where a witness was not allowed to state the amount of damage which cattle suffered by improper feeding, but was permitted to state how much less valuable the cattle were when taken away, than they were when taken to the defendant's. The question ruled out was, "How much, in your opinion, was the damage sustained by the plaintiff in consequence of feeding the cattle the poor hay instead of that agreed upon?" So, also, the following were held improper: "What damages, in your opinion, has the plaintiff sustained?" (*Norman v. Wells*, 17 Wend. (N. Y.) 136.)



States, particularly Massachusetts, witnesses are permitted to express an opinion in answer to a direct inquiry, in all cases where the value of property is an issue.<sup>1</sup> And the evident tendency of modern judicial opinion is to open the door to opinions on the amount of damages, in all cases where the value of property is in question.<sup>2</sup> In other words, where the two questions of value and amount of damage are identical, witnesses may express opinions on the latter question as well as the former.<sup>3</sup>

But in actions for personal injuries, libel, slander, and nuisance cases, and many others, where the element of injury to property is wanting, such opinions are clearly inadmissible on the question of the measure of damages. In such cases only an expert can form an opinion; and the rule is the same where property injured is of such a character that only experts can form an opinion as to its value or deterioration.<sup>4</sup>

§ 291. **Opinions as to Sanity and Mental Capacity.** — The subscribing witnesses to a will or deed may testify as to the mental condition of the testator, or grantor, at the time of

"From the description of the situation of the boat in question, as given by the witnesses, what would the damages be?" (*Paige v. Hazzard*, 5 Hill (N. Y.) 603.)

<sup>1</sup> *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.) 116, 117. See also *Mississippi &c. Bridge Co. v. Ring*, 58 Mo. 492.

<sup>2</sup> See *Mills on Em. Dom.* § 165; *Sexton v. North Bridgewater*, 116 Mass. 200; *Carter v. Thurston*, 58 N. H. 104; *Snow v. Boston & Maine R. Co.*, 65 Me. 230.

<sup>3</sup> *Rochester &c. R. R. Co. v. Budlong*, 10 How. (N. Y.) Pr. 289.

<sup>4</sup> See 1 Whart. Ev. § 450; *Central R. R. Co. v. Kelly*, 58 Ga. 107.

In the following cases, opinions of non-expert witnesses on the question of the amount of damage to property were rejected: *Pierson v. Wallace*, 7 Ark. 282; *Gilbert v. Cherry*, 57 Ga. 129; *Evansville R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Evansville R. Co. v. Stringer*, Id. 551; *Whitmore v. Bowman*, 4 Greene (Iowa) 148; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Rodgers v. Fletcher*, 13

*Abb.* (N. Y.) Pr. 299; *Harger v. Edmonds*, 4 Barb. (N. Y.) 256; *Giles v. O'Toole*, Id. 261; *Dolittle v. Eddy*, 7 Id. 74; *Simons v. Monier*, 29 Id. 419; *Armstrong v. Smith*, 44 Id. 120; *Richardson v. Northrup*, 66 Id. 85; *Thompson v. Dickhart*, Id. 604; *Fish v. Dodge*, 4 Den. (N. Y.) 311; *Duff v. Lyon*, 1 E. D. Smith (N. Y.) 536; *Newton v. Fordham*, 7 Hun (N. Y.) 58; *Schermerhorn v. Tyler*, 11 Id. 549; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Atlantic &c. R. R. Co. v. Campbell*, 4 Ohio St. 583; *Cleveland &c. R. R. Co. v. Ball*, 5 Id. 568.

In the following cases, such opinions were admitted: *Johnson v. State*, 37 Ala. 457; *Ottawa &c. Co. v. Graham*, 35 Ill. 346; *Webber v. Eastern R. R. Co.*, 2 Metc. (Mass.) 147; *Shattuck v. Stoneham &c. R. R. Co.*, 6 Allen (Mass.) 115; *Kershaw v. Wright*, 115 Mass. 361; *Spencer v. St. Paul &c. R. R. Co.*, 22 Minn. 29; *Harris v. Panama R. R. Co.*, 36 N. Y. Superior Ct. 373; *Watry v. Hiltgen*, 16 Wis. 516; *Snyder v. West Union R. R. Co.*, 25 Wis. 60.

the execution of the instrument, and their opinions are admitted by the courts as freely as those of medical men. They are competent, whether they "happen to be the attending physicians, nurses, children, or chance strangers";<sup>1</sup> and they need not previously state the facts upon which they base their opinions.<sup>2</sup>

Whether non-professional witnesses other than the subscribing witnesses may testify to their opinions on this question, is a point upon which there is a marked difference of opinion. Many decisions hold that other than subscribing witnesses to a will may testify to the appearance of a testator, and to particular facts from which the state of his mind may be inferred; but they will not be permitted to testify as to their opinion or judgment merely of his sanity, or insanity, without stating the facts from which they draw their conclusions.<sup>3</sup>

Other cases hold that they must testify to facts only, and may not give their opinions along with the facts;<sup>4</sup> and still others allow witnesses who had actual knowledge of, and opportunities to observe the testator, in his lifetime, to testify to their opinions as to his sanity, although they are not professional experts, nor subscribing witnesses to the will.<sup>5</sup> But such opinions must be based on personal knowledge and

<sup>1</sup> *Hardy v. Merrill*, 56 N. H. 227, 243.

<sup>2</sup> *Logan v. McGinnis*, 12 Pa. St. 27; *Poole v. Richardson*, 3 Mass. 330; *Titlow v. Titlow*, 54 Pa. St. 216; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Williams v. Lee*, 47 Md. 321; *Call v. Byram*, 39 Ind. 499; *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.) 139.

<sup>3</sup> *Poole v. Richardson*, 3 Mass. 330; *Buckminster v. Perry*, 4 Mass. 593; *Hathorn v. King*, 8 Mass. 371; *Dorsey v. Warfield*, 7 Md. 65; *Kinne v. Kinne*, 9 Conn. 102; *Hunt v. Hunt*, 3 B. Mon. (Ky.) 575; *Lowe v. Williamson*, 1 Green (N. J.) Eq. 82; *Sloan v. Maxwell*, Id. 563; *Choice v. State*, 31 Ga. 424; *Dunham's Appeal*, 27 Conn. 192; *Berry v. State*, 10 Ga. 511; *Stewart v. Redditt*, 3 Md. 67; *Stewart v. Spedden*, 5 Md. 433; *Dewitt v. Barly*, 17 N. Y. 340; 13 Barb. 550; *Culver v. Haslam*, 7 Barb. (N. Y.) 314; *Clark v. State*, 12 Ohio, 483; *Butler v. St.*

*Louis Life Ins. Co.*, 45 Iowa, 93; *Gardiner v. Gardiner*, 34 N. Y. 155; *Clapp v. Fullerton*, Id. 190; *Walker v. Walker*, 14 Ga. 242; *Pelamourges v. Clark*, 9 Iowa, 1; *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 90; *Bricker v. Lightner*, 40 Pa. St. 199. See *Clary v. Clary*, 2 Ired. (N. C.) L. 78. Neither professional nor unprofessional witnesses can give an opinion as to mental capacity or condition, without first showing the facts upon which the opinion is founded. *White v. Bailey*, 10 Mich. 155; *Stackhouse v. Horton*, 2 McCart. (N. J.) 202.

<sup>4</sup> *Boardman v. Woodman*, 47 N. H. 120; *De Witt v. Barley*, 9 N. Y. 371; *Clapp v. Fullerton*, 34 N. Y. 190; *Elder v. Ogletree*, 36 Ga. 64; *Ware v. Ware*, 8 Me. 42.

<sup>5</sup> *Hardy v. Merrill*, 56 N. H. 227, reviewing many authorities. *S. P., Ford v. State*, 71 Ala. 385; *People v. Sandford*, 43 Cal. 29.

observation;<sup>1</sup> and "whether the means of information or facts proved, or the conclusions drawn by the witness are of the satisfactory character required to base a finding upon, or not, is for the consideration of the jury, under proper instructions."<sup>2</sup>

In Massachusetts the rule seems to be that an opinion cannot be given, but any *facts* noticed by the witness, such as incoherence or change in intelligence, may be testified to, even though the witness is not an expert and did not attest the will.<sup>3</sup> In Ohio the opinion of the witness must relate to the time of his examination; and upon the direct exami-

<sup>1</sup> *Hathaway v. Nat. Life Ins. Co.*, 48 Vt. 335; *Doe v. Reagan*, 5 Blackf. (Ind.) 217. See *Dicken v. Johnson*, 7 Ga. 484.

"Such opinions were excluded upon the theory, that special knowledge and skill were required to judge intelligently of the mental condition of another, and that if the witnesses gave a detailed account of the acts and conduct of the person whose mental capacity was in question, the jury was as competent to form an opinion thereon, as the witnesses themselves. That the opinions of professional witnesses should be received, as they could judge with some degree of accuracy, from pathological symptoms; but as non-professional witnesses could only form their opinions from the actual demonstrations of the person, those demonstrations should be stated to the jury, and that body left to form their own opinion as to the cause and character of the appearances described. The fact has come, however, to be generally recognized, that it is impossible so to describe the appearance and demonstrations of a person, as to convey any accurate idea of their exact character, and to leave upon the mind of jurors the legitimate impressions which such demonstrations and appearances naturally leave upon the mind of the actual observer. The result has been that many of the earlier cases have been overruled, and the principle has come to be generally recognized that non-professional witnesses may give their

opinions as to sanity, as a result of their personal observation of the person whose mental condition is in question, after first stating the facts which they observed." *Rogers on Exp. Test.* § 61, citing many cases.

In Alabama the court says: "No precise rule can be laid down as to the length or character of acquaintance which would render the opinion of a person not a physician admissible evidence on a question of insanity. In case of general insanity, — a total incapacity to distinguish right from wrong on any question, — the same degree of observation is not required to discover the existence of the disease as in cases of monomania or partial derangement, and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible; but in every case the circumstances must be such as to have afforded the witness the opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist." *Powell v. State*, 25 Ala. 21. As to who are deemed qualified by intimacy with and observation of the deceased, to give an opinion, see *Stukey v. Billah*, 41 Ala. 700; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Weems v. Weems*, 19 Md. 334; *Choice v. State*, 31 Ga. 424, 467.

<sup>2</sup> *McClackey v. State*, 5 Tex. App. 331.

<sup>3</sup> *Barker v. Comins*, 110 Mass. 477. *S. P.*, *May v. Bradlee*, 127 Id. 414.

nation his opinion at an anterior period cannot be called for; nor can he be asked his opinion as to the capacity of the testator to make a will.<sup>1</sup> And in Vermont the fact that the witness did not form his opinion at the time he saw and observed the facts testified to by him, does not render his opinion on that account inadmissible.<sup>2</sup>

In New Jersey it is held that the mere fact of a man's having affixed his signature to a will as a subscribing witness does not entitle his opinion, as to the competency of the testator, to any more weight than that of any one else who may be called upon to testify.<sup>3</sup>

The New York rule is perhaps the best settled and most satisfactory. In that State non-expert witnesses who have testified to facts bearing upon the mental condition of the testator, cannot state what they thought of his condition of mind, or their impressions as to it;<sup>4</sup> but they may characterize as rational or irrational the acts and declarations to which they have testified, and state the impression produced upon their minds by what they beheld or heard, their examination being limited to their conclusions from the specific facts they disclose, and so confined as to exclude any opinion on the general question of soundness or unsoundness of mind.<sup>5</sup>

<sup>1</sup> Runyan v. Price, 15 Ohio St. 1. S. P., Farrell v. Brennan, 32 Mo. 328. But see Wogan v. Small, 11 Serg. & R. (Pa.) 141.

<sup>2</sup> Hathaway v. Nat. Life Ins. Co., 48 Vt. 335.

<sup>3</sup> Turner v. Cheesman, 2 McCart. (N. J.) 243; Garrison v. Garrison, Id. 266; Boylan v. Meeker, Id. 310.

<sup>4</sup> Sisson v. Conger, 1 T. & C. (N. Y.) 564, 569; Real v. People, 42 N. Y. 282.

<sup>5</sup> Howell v. Taylor, 11 Hun (N. Y.) 214; Hewlett v. Wood, 55 N. Y. 635; O'Brien v. People, 36 Id. 276; Clapp v. Fullerton, 34 Id. 190; Higbee v. Guardian Mut. Life Ins. Co., 53 Id.

603; People v. Lake, 12 Id. 358; Deshon v. Merchants' Bank, 8 Bosw. (N. Y.) 461.

For further decisions adopting one or the other of the views given in the text, see Johnson v. State, 17 Ala. 618; State v. Brunetto, 13 La. Ann. 45; State v. Coleman, 27 Id. 691; Dickinson v. Barber, 9 Mass. 225; Com. v. Wilson, 1 Gray (Mass.) 337; State v. Pike, 49 N. H. 399; Sears v. Shaffer, 1 Barb. (N. Y.) 408; McDougald v. McLean, 1 Wins. (N. C.) 120; Wilkinson v. Pearson, 23 Pa. St. 117; Dove v. State, 3 Heisk. (Tenn.) 348.

## CHAPTER XXVI.

### EXPERT TESTIMONY.

- § 292. What Questions call for Expert Testimony.
- § 293. Qualifications of Experts. — Competency.
- § 294. Examination of Experts. — Hypothetical Questions.
- § 295. Physicians, Surgeons, and Chemists.
- § 296. Persons skilled in the Law.
- § 297. Surveyors and Civil Engineers.
- § 298. Mechanics, Artisans, and Persons skilled in a Trade or Vocation.
- § 299. Experts in Handwriting.
- § 300. Effect and Value of Expert Testimony.

§ 292. **What Questions call for Expert Testimony.**—The foundation of the rule admitting evidence of opinions—including those of experts—in certain cases is necessity.<sup>1</sup> The jury are to be enlightened in every possible way, and as they are not selected with a view to their qualifications to try the particular issue before them, but simply as men possessing the ordinary qualifications of mankind, when questions arise to be determined by them, involving an acquaintance with facts not coming within the ordinary range of human experience, skilled witnesses are permitted to enlighten them.<sup>2</sup> The true rule is that when the subject to be investigated so far partakes of the nature of a science or trade as to require a previous course of study or habit in order to the attainment of a knowledge of it, opinions of experts are admissible. Otherwise, if the relation of facts, and their probable result can be determined without especial skill or study. In such cases the facts themselves must be given, and the jury left to draw conclusions or inferences.<sup>3</sup>

<sup>1</sup> *State v. Clark*, 12 Ired. (N. C.) L. 152, 153; *City of Chicago v. McGiven*, 78 Ill. 347.

<sup>2</sup> *Moreland v. Mitchell Co.*, 40 Iowa, 394.

<sup>3</sup> *Muldowney v. Illinois Cent. R. R. Co.*, 36 Iowa, 462; *Rogers Exp. Test.* § 5 and cases cited.

“It is not because a man has a reputation for sagacity, and judgment, and power of reasoning, that his opinion is admissible; if so, such men might be called in all cases, to advise the jury, and it would change the mode of trial. But it is because a man’s professional pursuits, his peculiar skill and knowl-

It has been said that there are three classes of cases in which the opinions of experts are admissible in evidence: (1) Upon questions of science, skill, or trade, or others of like kind. (2) When the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance. (3) When the subject-matter of investigation so far partakes of the nature of a science, as to require a course of previous habit or study, in order to the attainment of a knowledge of it.<sup>1</sup>

Such opinions are inadmissible where the matter under investigation is of such a nature that it may be presumed to come "within the common experience of all men of common education, moving in ordinary walks of life."<sup>2</sup>

edge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." *Per Shaw, C. J., in New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319.

<sup>1</sup> *Jones v. Tucker*, 41 N. H. 546.

"It is often very difficult to determine in regard to what particular matters and points witnesses may give testimony by way of opinion. It is doubtful whether all the cases can be harmonized, or brought within any general rule or principle. The most comprehensive and accurate rule upon the subject, we believe to be as follows: That the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such, that inexperienced persons are not likely to prove capable of forming a correct judgment upon it, without such assistance [followed in *Kipner v. Biebl*, Alb. L. J. Sept. 3, 1881]; in other words, when it so far partakes of the nature of a science, as to require a course of previous habit or study in order to the attainment of a knowledge of it, and that the opinions of witnesses cannot be received when the inquiry is into a subject-matter, the nature of which is not such as to require any particular habits of study in order to qualify a man to under-

stand it. If the relation of facts and their probable results can be determined without especial skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury."\*

"The true test of the admissibility of such testimony, is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions, founded on such knowledge or experience, any aid to the court or to the jury in determining the questions at issue." *Taylor v. Town of Monroe*, 43 Conn. 36, 44.

<sup>2</sup> *New England Glass Co. v. Lovell*, 7 Cush. (Mass.) 319.

"If the jury can be put in possession of all the facilities for forming a correct opinion that the witness had, they must come to their conclusions unembarrassed by the opinions of others." *Dillard v. State*, 58 Miss. 368, 388.

"It is only where the matter inquired of lies within the range of the peculiar skill and experience of the witness, and is one of which the ordinary knowledge and experience of mankind

\* *Muldowney v. Illinois Cent. R. R. Co.*, 36 Iowa, 462.

Considerable difficulty has arisen in the application of this rule, plain and simple though it appear when abstractly considered. It has been said that "the principles on which the authorities rest are more consistent than the attempts to apply them."<sup>1</sup> The distinctions between facts lying within, and those lying without the range of common experience and ordinary intelligence, are not always satisfactorily drawn by the authorities.<sup>2</sup>

does not enable them to see what inferences should be drawn from the facts, that the witness may supply opinions as their guide." *Kennedy v. People*, 39 N. Y. 245. S. P., *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56, 60, 61.

<sup>1</sup> *Evans v. People*, 12 Mich. 27.

<sup>2</sup> The following are a few of the many questions which have been held to be within the range of common experience, and as to which, consequently, expert testimony is not admissible: Whether one building is so near another as to increase the hazard of fire insurance (*Milwaukee & C. R. R. Co. v. Kellogg*, 94 U. S. 469); whether the wound of which the deceased died could have been inflicted by a pistol-shot fired by the defendant from a certain direction (*People v. Westlake*, 62 Cal. 303); whether a sidewalk made of rough plank, laid on stringers, is properly constructed or not (*Alexander v. Town of Mt. Sterling*, 71 Ill. 366); whether plaintiff (a car-coupler) used due care or acted imprudently (*Hopkins v. Ind. & St. L. R. R. Co.*, 78 Ill. 32. S. P., *Belair v. C. & N. W. R. Co.*, 43 Iowa, 667; *Muldrow v. Ill. Central R. R. Co.*, 36 Id. 462); whether glass placed in a sidewalk to afford light to the area below, is unsafe, by reason of the too great smoothness or slipperiness of its surface (*City of Chicago v. McGiven*, 78 Ill. 347); whether a custom existed that the employment of an architect to make plans and designs for a building, carried with it an employment to superintend its construction (*Wilson v. Bauman*, 80 Ill. 493); whether a hay wagon loaded in a certain way, was safe for riding over

ordinary roads (*Bills v. City of Ottumwa*, 35 Iowa, 107); whether the falling of the span of a bridge was occasioned by a displacement of the stringers, resulting from the action of snow and ice (*Hughes v. Muscatine County*, 44 Iowa, 672); whether, in a given case, a shaded object would be rendered visible by a certain artificial light (*Weave v. K. & D. M. R'y Co.*, 45 Iowa, 246); whether an unoccupied building is a more hazardous risk than one occupied (*Cannel v. Phoenix Ins. Co.*, 59 Me. 582); whether a mill-site exists in a particular locality (*Clagett v. Easterday*, 42 Md. 617); as to the effect of water in disintegrating the mortar of a wall (*Underwood v. Waldron*, 33 Mich. 232); what hard-pan is, and whether any was found in excavating (*Currier v. Boston & C. R. R. Co.*, 34 N. H. 498); whether a person was intoxicated at a given time (*State v. Pike*, 49 N. H. 399); whether a railroad train stopped an ample time for all the passengers to get off (*Keller v. N. Y. Central R. R. Co.*, 2 Abb. (N. Y.) App. Dec. 480); whether it be dangerous to use a smoke-stack without a spark-catcher (*Teall v. Barton*, 40 Barb. (N. Y.) 137); how the running off of cars on the inside of a curve, instead of the outside, can be accounted for (*Murphy v. N. Y. Central R. R. Co.*, 66 Barb. (N. Y.) 125); whether a cattle guard is properly constructed (*Swartout v. N. Y. Central R. R. Co.*, 7 Hun (N. Y.) 571).

The following have been held to be proper questions for experts: Whether a certain usage existed on a question of navigation not governed by the sailing rules and regulations

§ 293. **Qualifications of Experts; Competency.**—The term “expert” has been variously defined,<sup>1</sup> and perhaps the most satisfactory definition is that given in Redfield’s edition of Greenleaf’s Evidence: “The term ‘expert’ seems to imply both superior knowledge and practical experience in the art or profession; but generally, nothing more is required to entitle one to give testimony as an expert, than that he has been educated in the particular art or profession.”<sup>2</sup>

(The City of Washington, 92 U. S. 31); whether it is safe for a tug-boat, in a place named, to attempt to tow three boats abreast (Transportation Line v. Hope, 95 U. S. 297); what caused the breaking of machinery, by which breaking plaintiff received injury for which he sued (Camp Point Mfg Co. v. Ballow, 71 Ill. 417); whether two pieces of wood were parts of the same stick of natural growth (Commonwealth v. Choate, 105 Mass. 451); whether, and to what extent, cribbing affects the value of a fast trotting horse (Miller v. Smith, 112 Mass. 470); whether the place where a raft is moored is safe (Hayward v. Knapp, 23 Minn. 431. S. P., Moore v. Westervelt, 9 Bosw. (N. Y.) 558); whether or not the instrument in evidence, identified as that with which the homicide was committed, would, in the hands of a man of ordinary strength, and used as a bludgeon, produce the wounds described and be likely to produce death (Waite v. State, 13 Tex. App. 169).

<sup>1</sup> “All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts so far as expertness is required.” *Per* Maule, J., in *Vander Donckt v. Thellusson*, 8 Man. G. & S. 812; followed in *Bird v. Commonwealth*, 21 Gratt. (Va.) 800. Other definitions found in the books are: “A skilful or experienced person; a person having skill, experience, or peculiar knowledge on certain subjects, or in certain professions; a scientific witness.” *Heald v. Thing*, 45 Me. 394. “A person of large experience in any particular department of

art, business, or science.” *Dickinson v. Fitchburg*, 13 Gray (Mass.) 555. “One who by practice or observation has become experienced therein.” *Rochester v. Chester*, 3 N. H. 365. “An expert must have made the subject upon which he gives his opinion, a matter of particular study, practice, or observation, and he must have particular special knowledge on the subject.” *Jones v. Tucker*, 41 N. H. 546. “One instructed by experience; and to become one requires a course of previous habit and practice, or of study, so as to be familiar with the subject.” *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 460. “Knowledge of any kind, gained for and in the course of one’s business as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion, founded on such knowledge, admissible in evidence.” *Buffum v. Harris*, 5 R. I. 250. “A person that possesses peculiar skill and knowledge upon the subject-matter that he is required to give an opinion upon.” *State v. Phair*, 48 Vt. 377.

<sup>2</sup> 1 Greenl. Ev. § 440. The rule as to qualification is also well expressed in a New York case, where it is said that “the opinions of experts are only admissible, when it appears from the nature of their avocations, or from their testimony concerning their experience, that the matter inquired about involves some degree of science or skill which they have made use of, so that from experience, they are fitted to answer the question propounded with more accuracy than others who may not have been called upon to employ science, or exercise skill on



Before asking an expert witness's opinion, his competency to give it must be shown;<sup>1</sup> and in determining this question much is left to the discretion of the court trying the case,<sup>2</sup> whose decision of it will not be disturbed except it be manifestly wrong.<sup>3</sup> As to this, the Supreme Court of New Hampshire say that, "while it is settled, as matter of law, what qualifications are requisite, the possession of those qualifications is equally well settled to be a question of fact, purely within the discretion of the judge before whom the witness is offered. His decision concerning the matter is not subject to revision. It would not be wise to adopt a different rule. The ability or disability of a witness to testify, under the legal requirements for the admission of opinion, is a matter most conveniently and satisfactorily determined at the trial, upon personal examination of the witness. It can, indeed, be determined in no other way."<sup>4</sup>

The presence or absence of the necessary qualifications is determined by a preliminary examination of the witness as to his acquaintance with the subject-matter in reference to which his opinion is desired, and what he has done to qualify himself as an expert in that particular department of inquiry.<sup>5</sup> He need not possess the highest degree of skill,<sup>6</sup> but such skill or knowledge as he is found to possess should have been acquired in some profession or trade.<sup>7</sup> There is no test "by which we can determine with mathematical precision, just how much experience a witness must have had, how expert, in short, he must be, to render him competent to testify as an expert."<sup>8</sup>

the subject." *Clark v. Bruce*, 19 Hun (N. Y.) 276.

<sup>1</sup> *Jones v. Tucker*, 41 N. H. 546.

<sup>2</sup> *Hills v. Home Ins. Co.*, 129 Mass. 345; *Howard v. Providence*, 6 R. I. 516.

<sup>3</sup> *Sorg v. First German Cong.*, 63 Pa. St. 156; *Delaware &c. Co. v. Starrs*, 69 Pa. St. 36.

<sup>4</sup> *Jones v. Tucker*, 41 N. H. 547. *S. P.*, *Wright v. Williams*, 47 Vt. 233.

<sup>5</sup> *Boardman v. Woodman*, 47 N. H. 120.

<sup>6</sup> *Yates v. Yates*, 76 N. C. 142; *State v. Hincle*, 6 Iowa, 159.

<sup>7</sup> *Lincoln v. Inhabitants of Barre*, 5 Cush. (Mass.) 591.

<sup>8</sup> *Forgery v. First Nat. Bank*, 66 Ind. 125. See also *McEwen v. Bigelow*, 40 Mich. 215.

"A painter, in virtue of the special knowledge and skill acquired in his employment of painting, could learn nothing of the proper mode of framing together materials for the construction of a building. Whatever knowledge he acquires respecting carpenter and joiner work, must be gained from mere observation and attention. But any observant man, whose attention has been specially directed to buildings in process of erection and erected, could have equal means of knowledge, and could be

In many cases a witness may be qualified to testify as an expert by reason of a previous course of reading and study upon a particular subject of inquiry, without having had any practical experience or observation of it; but not if his reading or study was merely for the purpose of qualifying himself as a witness in the particular case.<sup>1</sup>

Again, his competency often depends upon whether he has heard the evidence given on the trial; for his opinion, if he gives one, must be founded upon facts proved by the other witnesses in the case.<sup>2</sup> But it does not follow that he must have heard all the evidence given on the trial,<sup>3</sup> if he heard that part of it which is material to the question upon which his opinion is required;<sup>4</sup> and the mere fact that he has heard the testimony of the other witness will not qualify, if he possesses no other knowledge of the facts involved than that acquired at the trial.<sup>5</sup>

§ 294. **Examination of Experts; Hypothetical Questions.**—

(1) *Examination generally considered.* There is no established form for questions to experts, and any question may be proper which will elicit their opinions as to the matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts.<sup>6</sup> It is not the expert's province to draw inferences from the evidence of other witnesses, unless the facts testified to are clear and uncontroverted, or

equally qualified to give an opinion. But the opinion of a witness is not to be received merely because he has had some experience, or greater opportunity of observation than others, unless the experience relates to matters of skill and science. It is true the witness in question could tell whether a joint was a close or an open one. And any observant person, without special instruction or skill, could do as much. But it is apparent that, to admit as an expert every person who had availed himself of an opportunity to observe a structure, and who had acquired a knowledge as to the closeness of the joints, would overturn entirely the rule respecting expert testimony." *Kilbourne v. Jennings*, 38 Iowa, 533.

<sup>1</sup> As to this branch of the subject, see *Collier v. Simpson*, 5 Car. & P. 73; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; *Dole v. Johnson*, 50 N. H. 452, 455; *State v. Wood*, 53 N. H. 484; *Melvin v. Easley*, 1 Jones (N. C.) L. 388.

<sup>2</sup> *Walker v. Fields*, 28 Ga. 237; *Emerson v. Lowell Gas Light Co.*, 6 Allen (Mass.) 146; *Heald v. Thing*, 45 Me. 392.

<sup>3</sup> *Miller v. Smith*, 112 Mass. 475.

<sup>4</sup> *Carpenter v. Blake*, 2 Lans. (N. Y.) 206. See also *Thayer v. Davis*, 38 Vt. 163; *Webb v. State*, 9 Tex. App. 490.

<sup>5</sup> *Ayres v. Water Comm'rs*, 22 Hun (N. Y.) 297.

<sup>6</sup> *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.) 169.

to take into consideration such facts as he can recollect that have been testified to and thus form an opinion, but he should have full information of the ascertained or supposed state of facts upon which his opinion is based.<sup>1</sup> The witness should either give an opinion founded on his own knowledge of the facts, or must give one founded on a hypothetical question.<sup>2</sup>

It is improper to ask a question founded on all the testimony the expert witness has heard in the case, without assuming any facts as established thereby. Such a question leaves it to the witness to say what facts are established by the evidence which he has heard, which is the province of the jury. Questions of this character, to be admissible, should always be hypothetical, based either upon the hypothesis of the truth of all the evidence given, or on a hypothesis, specially framed, of certain facts assumed to be proved for the purpose of the inquiry.<sup>3</sup>

The whole matter is well summed up by the Supreme Court of Massachusetts, as follows: "The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded."<sup>4</sup>

<sup>1</sup> *Guiterman v. Liverpool &c. Steamship Co.*, 83 N. Y. 358; *Jameison v. Drinkald*, 12 Moo. 148.

<sup>2</sup> *Freeman v. Lawrence*, 43 N. Y. Superior Ct. 288.

<sup>3</sup> *Carpenter v. Blake*, 2 Lans. (N. Y.) 206.

"A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them." *Doltz v. Morris*, 10 Hun (N. Y.) 202.

In another case, in speaking of the proper manner of examining experts, it is said: "The questions to him must be so shaped as to give him no occasion to mentally draw his own conclusions from the whole evidence, or a part thereof, and from the con-

clusion so drawn, express his opinion, or to decide as to the weight of evidence or the credibility of witnesses; and his answers must be such, as not to involve any such conclusions so drawn, or any opinion of the expert, as to the weight of the evidence, or the credibility of the witnesses." *McMechen v. McMechen*, 17 W. Va. 694. See also *United States v. McGlue*, 1 Curt. (U. S.) 1; *The Clement*, 2 Id. 363; *Walker v. Fields*, 28 Ga. 237; *Horne v. Williams*, 12 Ind. 324; *Crawford v. Wolf*, 29 Iowa, 567; *Butler v. St. Louis Life Ins. Co.*, 45 Iowa, 93; *Spear v. Richardson*, 37 N. H. 23; *Wright v. Hardy*, 22 Wis. 348; *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

<sup>4</sup> *Hunt v. Lowell Gas Light Co.*, 8 Gray (Mass.) 169.

(2) *Hypothetical questions.* "In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true he can form an opinion, and what that opinion is."<sup>1</sup> He must not be allowed to draw inferences or conclusions of fact from the evidence.<sup>2</sup>

The hypothetical questions may either be based upon the hypothesis of the truth of all the evidence, or on a hypothesis framed on assumed facts for the especial purpose of the inquiry,<sup>3</sup> and an error in the assumption does not make the hypothetical question objectionable, if it is within the possible or probable range of the evidence.<sup>4</sup> But the facts of the actual case should be fairly represented,<sup>5</sup> the question must be to some fair extent based on them.<sup>6</sup> The answers of the witness must tend to establish every supposed fact in the question;<sup>7</sup> and the failure of such assumed facts involves the failure of the answers based upon such hypothetical questions.<sup>8</sup> Counsel will not be allowed to put into such questions "anything not proved or offered to be proved."<sup>9</sup>

<sup>1</sup> *Dickenson v. Fitchburg*, 13 Gray (Mass.) 556. *S. P.*, *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

<sup>2</sup> *Woodbury v. Obear*, 7 Gray (Mass.) 467, where the following question was disallowed: "Suppose all the facts stated by the witnesses to be true, was the testator laboring under an insane delusion, or was he of an unsound mind?"

<sup>3</sup> *Gotlieb v. Hartman*, 3 Col. 53.

<sup>4</sup> *Harnett v. Garvey*, 66 N. Y. 641; *Nave v. Tucker*, 70 Ind. 15; *Cowley v. People*, 83 N. Y. 464, where *Folger, C. J.*, says: "The claim is, that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes some-

thing for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice."

<sup>5</sup> *Stuart v. State*, 57 Tenn. 178.

<sup>6</sup> *State v. Anderson*, 10 Oreg. 448.

<sup>7</sup> *Hathaway v. Nat. Life Ins. Co.*, 48 Vt. 335; *Bomgardner v. Andrews*, 55 Iowa, 638.

<sup>8</sup> *Lovelady v. State*, 14 Tex. App. 545. See also *Williams v. Brown*, 28 Ohio St. 551, 552; *Com. v. Mullins*, 2 Allen (Mass.) 296; *Boardman v. Woodman*, 47 N. H. 135.

<sup>9</sup> *Fraser v. Jennison*, 42 Mich. 227.

How these rules apply where a part only of a hypothetical question, susceptible of division, is sustained by the evidence, see *Eggers v. Eggers*, 57 Ind. 461.

Where there is no conflict in the evidence on the material points of the case, the questions to experts need not be put hypothetically,<sup>1</sup> nor need they be when the expert is personally acquainted with the material facts.<sup>2</sup>

The party calling the expert having put his hypothetical question based on his theory of the facts proven, the opposite party may put one based on his view of the evidence.<sup>3</sup>

As to the proper form of hypothetical questions, the Supreme Court of Vermont say: "A study of the various cases will show that the form of the question is modified and shaped by the courts; whether it states facts, or puts facts hypothetically, or refers to the testimony of witnesses as being true, so as to give the witness no occasion or opportunity to decide upon the evidence, or mingle his own opinion of the facts, as shown by the evidence, with the facts upon which he is to express a professional opinion. This is the important point, and to secure this, various forms of inquiry have been adopted. Hypothetical questions may be so put as to require the witness to decide upon the evidence, to determine which side preponderates, and to find conclusions from the evidence, in order to reconcile conflicting facts. Such questions, though hypothetical, are as clearly improper as if they directly sought the opinion of the witness on the merits of the case. Hence, in framing such questions, care should be taken not to involve so much, or so many facts in them, that the witness will be obliged in his own mind to settle other disputed facts, in order to give his answer. . . . In some cases, all the facts bearing on the issue might be summed up in a single question. But when facts on one side conflict with facts on the other, they ought not to be incorporated into one question, but the attention of the witness should be called to their opposing tendencies, and if his

skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. Then the jury can know all the facts and grounds on which the opinion is based." \*

<sup>1</sup> *Cincinnati &c. Mut. Ins. Co. v. May*, 20 Ohio, 211; *Tefft v. Wilcox*, 6 Kan. 46; *Pidcock v. Potter*, 68 Pa. St. 342; *Guterman v. Liverpool &c. S. S. Co.*, 83 N. Y. 358; *State v. Klinger*, 46 Mo. 224.

<sup>2</sup> *Bellefontaine &c. R. R. Co. v. Bailey*, 11 Ohio St. 333; *Transportation Line v. Hope*, 95 U. S. 297; *Brown v. Huffard*, 69 Mo. 305; *Bellinger v. N. Y. Cent. R. R. Co.*, 23 N. Y. 42.

Thus, where "a physician visits a person and from actual examination or observation becomes acquainted with his mental condition, he may give an opinion respecting such mental condition at that time; that is, he may, under such circumstances, state to the jury his opinion as to the sanity or insanity of the person at the time when he thus observed or examined him." *Per* Dillon, C. J., in *State v. Felter*, 25 Iowa, 74, 75. See also *McNaghten's Case*, 10 Cl. & F. 211; *State v. Glass*, 5 Oreg. 73; *Pullman v. Corning*, 9 N. Y. 93; *State v. White*, 76 Mo. 96.

<sup>3</sup> *Davis v. State*, 35 Ind. 496, where the court say: "We think that when such a witness has expressed an opinion based on facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, the other party

\* *Fairchild v. Bascomb*, 35 Vt. 415. See also *State v. Lautenschlager*, 22 Minn. 521; *Getchell v. Hill*, 21 Id. 464; *Hagadorn v. Connecticut Mut. Life Ins. Co.*, 22 Hun (N. Y.) 251; *Haggerty v. Brooklyn &c. R. R. Co.*, 61 N. Y. 624; *Webb v. State*, 9 Tex. App. 490; *Gilman v. Town of Strafford*, 50 Vt. 726; *Wright v. Hardy*, 22 Wis. 348.

Questions of law should not be put,<sup>1</sup> nor should an opinion be asked from an expert testifying from personal knowledge, upon facts as to which he has not testified, so that it can be seen upon what facts he bases his opinion; <sup>2</sup> or, as a general rule, upon facts heard by him out of court.<sup>3</sup>

§ 295. **Physicians, Surgeons, and Chemists.**—(1) *Medical men.* Any practising physician or surgeon is competent to testify as an expert on a matter of medicine or surgery.<sup>4</sup> Such a witness is “in law an expert as to all matters embraced within the range of his profession.”<sup>5</sup> Thus, the opinions of medical men are evidence, not only as to the state of a patient whom they have seen,<sup>6</sup> or as to the cause of the death of a person whose body they have examined,<sup>7</sup> or as to the nature of the instrument causing wounds which they have inspected;<sup>8</sup> but also in cases where they have not themselves seen the patient, but have only heard the symptoms and particulars of his state detailed by other witnesses at the trial; their opinion on the nature of such symptoms is always admitted. Thus, in prosecutions for murder, they are allowed to state their opinion, whether the wounds or injuries, described by other witnesses, were likely to be the cause of death.<sup>9</sup> So, upon a question of sanity,<sup>10</sup> they may form their judgment from the representations which witnesses at the trial have given of the conduct, manner, and general appearance exhibited by the patient; or they may give their opinion whether certain circumstances were likely to produce a paroxysm of the disorder. But they cannot be asked to state their opinion upon the very point which the jury have to decide; namely, whether the act for which the prisoner is being tried was an act of insanity.<sup>11</sup>

may cross-examine him by taking his opinion based on any other set of facts assumed by him to have been proved by the evidence, or upon a hypothetical case put to him.”

<sup>1</sup> *Farrell v. Brennan*, 32 Mo. 328.

<sup>2</sup> *Reid v. Piedmont &c. Life Ins. Co.*, 58 Mo. 425; *Haggerty v. Brooklyn &c. R. R. Co.*, 61 N. Y. 624.

<sup>3</sup> *Polk v. State*, 36 Ark. 117.

<sup>4</sup> *Livingston's Case*, 14 Gratt. (Va.) 592; *Bird's Case*, 21 Id. 800; *De Phue v. State*, 44 Ala. 39.

<sup>5</sup> *State v. Clark*, 15 So. Car. 408.

<sup>6</sup> *Bush v. Jackson*, 24 Ala. 273;

*Livingston's Case*, *supra*; *Cooper v. State*, 23 Tex. 336.

<sup>7</sup> *Pitts v. State*, 43 Miss. 472; *State v. Bowman*, 78 N. C. 509; *Shelton v. State*, 34 Tex. 666; *State v. Smith*, 32 Me. 370; *State v. Pike*, 65 Me. 111; *McNair v. National Life Ins. Co.*, 13 Hun (N. Y.) 146; *Polk v. State*, 36 Ark. 117, 124.

<sup>8</sup> *Rogers Exp. Test.* § 54, and cases cited.

<sup>9</sup> *Ibid.* § 51, and cases cited.

<sup>10</sup> *Ibid.* §§ 56–62, and cases cited.

<sup>11</sup> *McNachten's Case*, 10 Cl. & F. 200, 211.

But their opinions must be confined to matters of science or skill; therefore a physician cannot be asked whether, in his opinion, another physician, in refusing to consult with a third physician, had honorably and faithfully discharged his duty to the medical profession.<sup>1</sup>

The physician should have been engaged in active practice to be competent to testify as an expert. Mere study and education is not deemed sufficient to qualify him.<sup>2</sup> But he need not have made the particular ailment in question a specialty,<sup>3</sup> while if he devoted himself exclusively to some branch of the profession entirely apart from the matter as to which he is called to testify, he is incompetent.<sup>4</sup>

If a physician visits a patient and examines into his mental condition, he may give his opinion as to his sanity or insanity;<sup>5</sup> or he can do so without having seen the patient, in response to a hypothetical question.<sup>6</sup>

<sup>1</sup> *Ramadge v. Ryan*, 9 Bing. 333; *People v. Medical Society*, 32 N. Y. 187; *Mosely v. Wilkinson*, 14 Ala. 812.

<sup>2</sup> *Fairchild v. Bascomb*, 35 Vt. 410; *Polk v. State*, 36 Ark. 117. But see *Fullis v. Kidd*, 12 Ala. 648; *Roberts v. Johnson*, 58 N. Y. 613.

<sup>3</sup> *Hathaway v. National Life Ins. Co.*, 48 Vt. 335, 351; *State v. Reddick*, 7 Kan. 143.

<sup>4</sup> *Fairchild v. Bascomb*, 35 Vt. 410; *Com. v. Rice*, 14 Gray (Mass.) 335. See also *Rogers Exp. Test.* § 44, and cases cited.

<sup>5</sup> "There is no more reason why he may not do this, than why he might not testify that he saw a certain person at a certain time, and that he was then laboring under an epileptic fit, or under an attack of typhus fever, or had been stricken down and rendered unconscious by an apoplectic stroke." *State v. Felter*, 25 Iowa, 75.

<sup>6</sup> *Potts v. House*, 6 Ga. 324; *State v. Windsor*, 5 Harr. (Del.) 512; *Gueting v. State*, 66 Ind. 94; *Hoge v. Fisher*, 1 Pet. C. C. (U. S.) 163, 164.

For further decisions as to the competency of physicians as expert witnesses, and the admissibility of their opinions, in particular instances, see

the cases grouped below according to the subject-matter under investigation.

*Abortion cases.* *R. v. Still*, 30 U. C. C. P. 30; *State v. Smith*, 32 Me. 370; *Com. v. Brown*, 14 Gray (Mass.) 419; *State v. Wood*, 53 N. H. 484.

*Cases of assaulting and wounding.* *Batten v. State*, 80 Ind. 394; *State v. Murphy*, 33 Iowa, 270; *Davis v. State*, 38 Md. 15, 43; *People v. Rogers*, 13 Abb. (N. Y.) Pr. n. s. 370; *Fort v. Brown*, 46 Barb. (N. Y.) 366; *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Rumsey v. People*, 19 N. Y. 41; *Kennedy v. People*, 39 N. Y. 245; *Lindsay v. People*, 63 N. Y. 143; *Wilson v. People*, 4 Park. (N. Y.) Cr. 619; *Gardiner v. People*, 6 Id. 155, 202; *People v. Kerrains*, 1 Thomp. & C. (N. Y.) 333; *Waite v. State*, 13 Tex. App. 169; *Banks v. State*, Id. 182; *Powell v. State*, Id. 244.

*Impotency cases.* *Devenbagh v. Devenbagh*, 5 Paige (N. Y.) 554; *Newell v. Newell*, 9 Id. 26; *Brown v. Brown*, 1 Hagg. 523; *Briggs v. Morgan*, 3 Phillim. 325.

*Malpractice cases.* *Hoener v. Koch*, 84 Ill. 408; *Twombly v. Leach*, 11 Cush. (Mass.) 405; *Barber v. Merriam*, 11 Allen (Mass.) 322; *Leighton v. Sargent*, 31 N. H. 120; *Roberts v.*

(2) *Chemists*. The opinions of chemists are resorted to, for the most part, in cases involving the detection of poisons in human remains, and in the examination of blood-stains, with a view to ascertain whether caused by the effusion of human blood or that of the lower animals. For these purposes both the microscope and the chemical analysis are resorted to. The general rules governing competency to give opinions being the same as those which apply in the cases of physicians and surgeons, a bare citation of some of the leading authorities upon the subject is all that need be given.<sup>1</sup>

§ 296. **Persons skilled in the Law** — (1) *Lawyers as experts, generally*. It is an elementary rule that courts will not receive the opinions of experts upon matters of which they take judicial notice; such as the law of nations, the law merchant, the Constitution of the United States, and of the state of the forum, the domestic law of the latter, and the federal statutes. As to these matters, and many others of which

Johnson, 58 N. Y. 613; Doyle v. N. Y. Eye and Ear Infirmary, 80 N. Y. 631; Heath v. Glisan, 3 Oreg. 67; Boydston v. Giltner, Id. 118; Williams v. Poppleton, Id. 139; Mertz v. Detweiler, 8 Watts & S. (Pa.) 376; Wright v. Hardy, 22 Wis. 348.

*Question of pregnancy*. Stater v. Smith, 32 Me. 369; Young v. Makepeace, 103 Mass. 50; State v. Knapp, 45 N. H. 148; State v. Wood, 53 N. H. 484; Mason v. Fuller, 45 Vt. 29.

*Rape cases*. State v. Knapp, *supra*; Cook v. State, 4 Zab. (N. J.) 843; Woodin v. People, 1 Park. (N. Y.) Cr. 464; State v. Smith, Phil. (N. C.) L. 302.

*As to diseases in animals*. Benson v. Griffin, 30 Ga. 106; House v. Fort, 4 Blackf. (Ind.) 293; Moulton v. Scruton, 39 Me. 288; Stonam v. Waldo, 17 Mo. 489; Spear v. Richardson, 34 N. H. 428; Pierson v. Hoag, 47 Barb. (N. Y.) 243; Slater v. Wilcox, 57 Id. 604; Harris v. Panama R. R. Co., 3 Bosw. (N. Y.) 7; Horton v. Green, 64 N. C. 64; State v. Sheets, 89 N. C. 543.

*As to mental condition, insanity, etc.* Walker v. Walker, 34 Ala. 469; Davis v. State, 35 Ind. 496; State v. Reddick,

7 Kan. 143; Heald v. Thing, 45 Me. 392; Com. v. Rich, 14 Gray (Mass.) 335; Russell v. State, 53 Miss. 368; Fingley v. Cowgill, 48 Mo. 291; Reed v. People, 1 Park. (N. Y.) Cr. 481; Lake v. People, Id. 495; Clark v. State, 12 Ohio, 483; Pigg v. State, 43 Tex. 108.

*As to intoxication and intemperate habits*. Rawls v. Amer. Life Ins. Co., 36 Barb. (N. Y.) 357; State v. Smith, 49 Conn. 376; Linton v. Hurley, 14 Gray (Mass.) 191.

<sup>1</sup> *Detection of poisons*. Mitchell v. State, 58 Ala. 418; Polk v. State, 36 Ark. 117; State v. Hinkle, 6 Iowa, 380; State v. Cook, 17 Kan. 392; State v. Knights, 43 Me. 11; Bierce v. Stocking, 11 Gray (Mass.) 174; People v. Robinson, 2 Park. (N. Y.) Cr. 236; Hartung v. People, 4 Park. (N. Y.) Cr. 319; State v. Bowman, 78 N. C. 509; State v. Slagh, 83 Id. 630; State v. Terrill, 12 Rich. (S. C.) 321. And see a very able article on this subject by R. Ogden Doremus, M.D., LL.D., Prof. Chemistry and Toxicology in Bellevue Hospital Med. Coll. published in 1 Crim. L. Mag. 293.



judicial notice is taken, the opinions of experts, being unnecessary, are inadmissible. Thus an expert cannot give his opinion whether, upon the face of a conveyance of real estate it covers the premises in controversy;<sup>1</sup> that being a question of domestic law. Nor can lawyers be called to testify what is the practice of the profession, under a certain statute of the State, for the purpose of guiding the judge in the construction to be placed upon the statute.<sup>2</sup>

So, also, an attorney should not be permitted to give his opinion on a matter of moral or legal obligation, such as the rights and duties of another attorney as between himself and his client.<sup>3</sup> But his opinion is admissible, as that of an expert, on the question of the value of the professional services of another attorney.<sup>4</sup>

(2) *Proof of foreign law.* By foreign law is here meant the written and unwritten law of a sister state, as well as that of a foreign country; and, as a general rule, only the unwritten law can be proved by expert testimony, under the rule requiring the best evidence.<sup>5</sup>

The statute itself, if the foreign law in question be a written one, is the best evidence, and is ordinarily, but not always required.<sup>6</sup> But in the absence of evidence that the foreign law in question is a written law, it will be presumed that it is unwritten;<sup>7</sup> and the extreme difficulty of its production has, in some cases, led to the admission of oral evidence of it.<sup>8</sup>

<sup>1</sup> *Norment v. Fastnacht*, 1 Mac-Arth. (D. C.) 515.

<sup>2</sup> *Gaylor's Appeal*, 43 Conn. 82. But see *Armstrong v. Risteau*, 5 Md. 256.

<sup>3</sup> *Chessman v. Merkel*, 3 Bosw. (N. Y.) 402.

<sup>4</sup> *Allis v. Day*, 14 Minn. 516; *Harnett v. Garvey*, 66 N. Y. 641; *Williams v. Brown*, 28 Ohio St. 547; *Anthony v. Stinson*, 4 Kan. 211; *Ottawa University v. Parkinson*, 14 Kan. 159; *Jevne v. Osgood*, 57 Ill. 340. In *Thompson v. Boyle* (85 Pa. St. 477) it is said that "the very best means of adjusting this value are the opinions of those who, in earning and receiving compensation for them, have learned what legal services in their various grades are worth."

<sup>5</sup> "That no testimony shall be re-

ceived which presupposes better testimony attainable by the party who offers it, applies to foreign law, as it does to all other facts." *Per* Chief Justice Marshall, in *Church v. Hubbard*, 2 Cranch (U. S.) 187, 237.

<sup>6</sup> Thus the practice and usage under the statute law of a sister state may be proved by the evidence of experts (*Greasons v. Davis*, 9 Iowa, 219); as may its "exposition, interpretation, and adjudication." *Walker v. Forbes*, 31 Ala. 9; *Hoes v. Van Alstyne*, 20 Ill. 202.

<sup>7</sup> *Dougherty v. Snyder*, 15 S. & R. (Pa.) 84. But see *Seeton v. Delaware Ins. Co.*, 2 Wash. (U. S.) 175, 176; *Robinson v. Clifford*, *Id.* 1.

<sup>8</sup> See *Roberts' Will*, 8 Paige (N. Y.) 446; *Barrows v. Downs*, 9 R. I. 453.

The *unwritten* laws, customs, and usages, of a foreign country, or of another State of the Union, may be proved by parol evidence. Mr. Story, in his Commentaries upon the Conflict of Laws, says: "The usual course is to make such proof by the testimony of competent witnesses instructed in the law, under oath."<sup>1</sup>

Any person, however, whether a professional lawyer or not, who appears to the court to be well informed on the point, is competent.<sup>2</sup> So, a clergyman of another State is competent to prove the law of that state relating to marriage,<sup>3</sup> and Mexicans, not lawyers, may prove the land laws prevailing in Mexico.<sup>4</sup> And it seems, the witness's knowledge of the foreign law need not have been acquired in the country governed by that law.<sup>5</sup>

§ 297. **Surveyors and Civil Engineers.**—(1) *Surveyors.* A practical surveyor, who testifies that he is familiar with the peculiar marks used by the United States surveyors, in their government surveys, may give his opinion whether a particular line was marked by them.<sup>6</sup> Such a surveyor may state his opinion as to whether certain piles of stones and tree-marks are boundary monuments.<sup>7</sup> In a contest between adjacent

<sup>1</sup> Story Conf. Laws, 530. See also *Kenny v. Van Horn*, 1 Johns (N. Y.) 385, 394; *Woodbridge v. Austin*, 2 Tyler (Vt.) 364, 367; *Robinson v. Clifford*, 2 Wash. (U. S.) 1, 2; *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 482; *Bagley v. Francis*, 14 Mass. 453; *Willings v. Consequa*, 1 Pet. (U. S.) C. C. 225, 229; *Brush v. Wilkins*, 4 Johns (N. Y.) Ch. 506, 520; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 117; *Wilson v. Smith*, 5 Yerg. (Tenn.) 398, 399; *M'Rae v. Mattoon*, 13 Pick. (Mass.) 53.

<sup>2</sup> *Amer. Life Ins. Co. v. Rosenagle*, 77 Pa. St. 507; *Pickard v. Bailey*, 26 N. H. 152; *Hall v. Costello*, 48 N. H. 176. See also *Dauphin v. United States*, 6 Ct. of Cl. 221; *Consolidated Real Estate &c. Co. v. Cahow*, 41 Md. 59; *Mowry v. Chase*, 100 Mass. 79; *Wilson v. Carson*, 12 Md. 54; *Phelps v. Town*, 14 Mich. 374.

<sup>3</sup> *Bird v. Com.*, 21 Gratt. (Va.) 800.

<sup>4</sup> *State v. Cuellar*, 47 Tex. 304.

The unwritten law of a foreign country, or another state, may also be proved by books of reports and cases decided. *Raynham v. Canton*, 3 Pick. (Mass.) 293, 296; *M'Rae v. Mattoon*, 13 Id. 59; *Dougherty v. Snyder*, 15; *S. & R. (Pa.)* 87; *Latimer v. Eglin*, 4 Dess. (S. C.) Eq. 26, 32; *Brush v. Scribner*, 11 Conn. 407. So, by public history (*Dougherty v. Snyder*, *supra*), and by the public documents of the country. *Semble*, *Wilson v. Smith*, 5 Yerg. (Tenn.) 398, 399. Sometimes, it is said, certificates of persons of high authority have been allowed as evidence. Story Conf. Laws, 530. See *In re Dormoy*, 3 Hagg. Eccl. 767. See *Leland v. Wilkinson*, 6 Pet. (U. S.) 317.

<sup>5</sup> *Molina v. United States*, 6 Ct. of Cl. 269. But see *Bristow v. Sequeville*, 5 Exch. 272; *Cartwright v. Cartwright*, 26 W. R. 684.

<sup>6</sup> *Brantly v. Swift*, 24 Ala. 390.

<sup>7</sup> *Davis v. Mason*, 4 Pick. (Mass.) 156.

lot-owners, as to the true location of the line, a practical surveyor, who has made an actual survey and plat of the lots, may give in evidence his opinion as to the correctness of such plat, and may state the result of his survey as to the location of the lines, and of buildings and fences on the lots with reference to such lines.<sup>1</sup> Such a surveyor need not be a county or government surveyor to enable him to testify to his surveys or the correctness of any plat of them.<sup>2</sup> His opinion is admissible to show that certain marks on a tree, claimed as a corner, were corner or line marks; but is not admissible to show that it was the corner of a particular grant.<sup>3</sup>

But a surveyor's evidence in such cases may be controlled, as well as any other parol evidence, by circumstances or other evidence.<sup>4</sup> Thus, where he testifies to certain corner marks, as having been made by a former surveyor, his *belief* that they were so made is not to be received as an expert opinion, but merely as the testimony of a witness to a fact within his knowledge, and is to be credited by the jury only so far as they believe him able, from his personal knowledge, to identify the marks in question.<sup>5</sup> Such an *opinion* is not evidence although the surveyor has died since expressing it.<sup>6</sup> So, also, a surveyor's opinion is not admissible as to the construction to be given to a survey, as returned,<sup>7</sup> or, as to the controlling calls in a conveyance,<sup>8</sup> or the true location of land in controversy;<sup>9</sup> nor can he deny the accuracy of the scale in his plat.<sup>10</sup>

(2) *Civil Engineers.* Engineers who have taken the comparative levels of a fountain of water, and of certain agricultural drains laid in the same lot of land, and have examined the character of the subsoil intervening between them, are, as experts, competent to testify to their opinion (in

<sup>1</sup> *Messer v. Reginnitter*, 32 Iowa, 439; *Stevens v. West*, 6 Jones (N. C.) 312. See also *Phillips v. Terry*, 3 Abb. (N. Y.) App. Dec. 607.

<sup>2</sup> *Mincke v. Skinner*, 44 Mo. 92; *Shook v. Pate*, 50 Ala. 91.

<sup>3</sup> *Clegg v. Fields*, 7 Jones (N. C.) L. 37.

<sup>4</sup> *Bowling v. Helm*, 1 Bibb (Ky.) 88. See also *Jones v. Bache*, 3 Wash. (U. S.) 199.

<sup>5</sup> *Barron v. Cobleigh*, 11 N. H. 557.

<sup>6</sup> *Wallace v. Goodall*, 18 N. H. See also *Lincoln v. Barre*, 5 Cush, (Mass.) 590.

<sup>7</sup> *Ormsby v. Ihmsen*, 34 Pa. St. 462. But see *Forbes v. Caruthers*, 3 Yeates (Pa.) 527; *Farr v. Swan*, 2 Pa. St. 245.

<sup>8</sup> *Whittlesey v. Kellogg*, 28 Mo. 404.

<sup>9</sup> *Blumenthal v. Roll*, 24 Mo. 113; *Schultz v. Lindell*, 30 Mo. 310; *Randolph v. Adams*, 2 W. Va. 519.

<sup>10</sup> *Twogood v. Hoyt*, 42 Mich. 609.

connection with the facts upon which it is founded) that the drains do not lessen the quantity of water in or injuriously affect the fountain.<sup>1</sup> So, skilled engineers may testify that it is not customary to have gates on draw-bridges;<sup>2</sup> whether a sleeper of a bridge had rotted recently or some time since;<sup>3</sup> how cuts and embankments should be built or constructed;<sup>4</sup> whether, reference being had to the wind and tide, the situation of the banks, the shifting of the sand, etc., a certain bank was the cause of the choking up of a harbor, by stopping the back-water;<sup>5</sup> and whether a city is liable to be inundated, and the effect upon a harbor of the removal of sand from the shore.<sup>6</sup>

On the other hand, a civil engineer cannot give his opinion as to whether it is safe and proper to have draws with drop-gates across the footpath of a bridge when the draw is open; this is a matter of opinion, and not within the range of expert evidence;<sup>7</sup> and an engineer is not necessarily an expert on the question of the proper construction of a highway;<sup>8</sup> nor can he testify whether, in his opinion, the right fork of a bayou was a natural outlet, or caused by a crevasse, or some sudden eruption of nature. Whether so caused or not, it was not artificial.<sup>9</sup>

§ 298. **Mechanics, Artisans, and Persons skilled in a Trade or Vocation.**—The competency of a witness as an expert, does not at all depend upon the nature of the calling he follows, but upon the extent of his knowledge of matters connected with that calling, which are of such a character as not to be within the range of common observation and ordinary experience. Thus, if it appears that a witness offered as an expert as to the value of goods, has actual knowledge of the stock of goods involved in the issue, and experience in the particular trade or business to which they belong, he should be allowed to state his opinion as to the value of the

<sup>1</sup> Buffum v. Harris, 5 R. I. 243.

<sup>2</sup> Hart v. Hudson River Bridge Co., 84 N. Y. 56.

<sup>3</sup> City of Indianapolis v. Scott, 72 Ind. 196.

<sup>4</sup> Central R. R. Co. v. Michell, 63 Ga. 173.

<sup>5</sup> Folkes v. Chadd, 3 Doug. 157.

<sup>6</sup> Clasen v. Milwaukee, 30 Wis. 316.

<sup>7</sup> Hart v. Hudson River Bridge Co., 84 N. Y. 86.

<sup>8</sup> Benedict v. City of Fond du Lac, 44 Wis. 495.

<sup>9</sup> Avery v. Police Jury, 12 La. Ann. 554.

goods.<sup>1</sup> So, any persons connected with a particular trade, *e.g.* the iron trade — whether as manufacturers, retail dealers, or workers in iron, may testify as to the meaning of particular terms or phrases used in that trade.<sup>2</sup> It follows from this that there are no special rules as to expert testimony, which apply exclusively, or even particularly, to mechanics, artisans, and persons skilled in any particular trade or vocation, except professional experts,<sup>3</sup> and experts in handwriting,<sup>4</sup> the rules relative to which classes of experts are elsewhere discussed. To examine, therefore, the numerous decisions upon this particular topic in detail, would unduly swell the contents of this book, without adding materially to its usefulness. The decisions, however, have been examined by the writer, and will be found cited below, grouped according to the business, trade, or vocation followed by the witness offered as an expert in the particular case.<sup>5</sup>

<sup>1</sup> *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121. *S. P., Laurent v. Vaughn*, 30 Vt. 90.

<sup>2</sup> *Evans v. Commercial &c. Ins. Co.*, 6 R. I. 47. See also to same effect, *Blodgett &c. Co. v. Farmer*, 41 N. H. 398; *Bearss v. Copley*, 10 N. Y. 93; *State v. Cheek*, 13 Ired. (N. C.) L. 114; *King v. Woodbridge*, 34 Vt. 565.

<sup>3</sup> *Supra*, §§ 295-297.

<sup>4</sup> *Infra*, § 299.

<sup>5</sup> *Architects*. *Gauntlett v. Whitworth*, 2 Car. & K. 720; *Wilson v. Bauman*, 80 Ill. 493; *Mourry v. Lord*, 3 Abb. (N. Y.) App. Dec. 392; *Tucker v. Williams*, 2 Hilt. (N. Y.) 562; *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133, 138.

*Builders and Carpenters*. *Wilson v. Bauman*, *supra*; *Haver v. Tenney*, 36 Iowa, 80; *Tebbetts v. Haskins*, 16 Me. 283; *Shepard v. Ashley*, 10 Allen (Mass.) 542; *Moulton v. McOwen*, 103 Mass. 587; *Simmons v. Carrier*, 68 Mo. 416; *Tinney v. New Jersey Steamboat Co.*, 12 Abb. (N. Y.) Pr. n. s. 1; s. c., 5 Lans. 507; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Bedell v. L. I. R. R. Co.*, 44 N. Y. 367; *Sikes v. Paine*, 10 Ired. (N. C.) L. 280; *Hills v. Home Ins. Co.*, 129 Mass. 345; *Hough v. Cook*, 69 Ill. 581.

*Gardeners, farmers, dairy-men, and stock-raisers*. *Spiva v. Stapleton*, 38 Ala. 171; *Young v. O'Neal*, 57 Id. 566; *Polk v. Coffin*, 9 Cal. 56; *Bells v. City of Ottawa*, 35 Iowa, 109; *Baltimore &c. R. R. Co. v. Thompson*, 10 Md. 76; *Vandene v. Burpee*, 13 Metc. (Mass.) 288; *Carpenter v. Wait*, 11 Cush. (Mass.) 257; *Higgins v. Dewey*, 107 Mass. 494; *Clague v. Hodgson*, 16 Minn. 329; *Keith v. Tilford*, 12 Neb. 275; *Whitbeck v. New York &c. R. R. Co.*, 36 Barb. (N. Y.) 644; *Seamans v. Smith*, 46 Id. 320; *Phillips v. Terry*, 3 Abb. (N. Y.) App. Dec. 609; *Lane v. Wilcox*, 55 Barb. (N. Y.) 615; *Fraser v. Tupper*, 29 Vt. 409.

*Insurance experts*. *Milwaukee &c. R. R. Co. v. Kellogg*, 94 U. S. 469; *Hawes v. New England &c. Ins. Co.*, 2 Curt. (U. S.) 229; *Moses v. Delaware Ins. Co.*, 1 Wash. (U. S.) 385; *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170, 187; *Schmidt v. Peoria Marine Ins. Co.*, 41 Ill. 295; *Niagara Ins. Co. v. Greene*, 77 Ind. 595; *Summers v. United States Ins. Co.*, 13 La. Ann. 504; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *State v. Watson*, 65 Me. 74; *Thayer v. Providence Ins. Co.*, 70 Me. 539; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Mulry*

§ 299. **Experts in Handwriting.** — *Proof of handwriting generally.* The simplest and most obvious proof of handwriting

*v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 545; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476; *Kern v. South St. Louis Mut. Ins. Co.*, 40 Mo. 19; *Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 451; *Hobby v. Dana*, 17 Barb. (N. Y.) 111; *Rawls v. Amer. Mut. Life Ins. Co.*, 27 N. Y. 282; *Higbie v. Guardian Mut. Life Ins. Co.*, 53 N. Y. 603; *Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253; *Cornish v. Farm Buildings Ins. Co.*, 74 N. Y. 295; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

*Lumbermen.* *Moore v. Lea*, 32 Ala. 375; *Boston &c. R. R. Corp. v. Old Colony &c. R. R. Corp.*, 3 Allen (Mass.) 142; *Hayward v. Knapp*, 23 Minn. 430; *Dean v. McLean*, 48 Vt. 412; *Salvo v. Duncan*, 49 Wis. 157.

*Machinists and mechanical engineers.* *Cooper v. Central R. R.*, 44 Iowa, 134; *Shildon v. Booth*, 50 Id. 209; *Seaver v. Boston &c. R. R. Co.*, 14 Gray (Mass.) 466; *Buxton v. Somerset Potter's Works*, 121 Mass. 446; *Curtis v. Gano*, 26 N. Y. 426; *James v. Hodsden*, 47 Vt. 127; *Brabbitts v. Chicago &c. R. R. Co.*, 38 Wis. 289.

*Masons.* *Montgomery v. Gilmer*, 33 Ala. 116; *Underwood v. Waldron*, 33 Mich. 232; *Smith v. Gugerty*, 4 Barb. (N. Y.) 619.

*Mechanics.* *Shulte v. Hennessey*, 40 Iowa, 352; *Moulton v. McOwen*, 103 Mass. 587; *Downs v. Sprague*, 1 Abb. (N. Y.) App. Dec. 550.

*Millers and millwrights.* *Stein v. Burden*, 24 Ala. 130; *Walker v. State*, 58 Ala. 393; *Doster v. Brown*, 25 Ga. 24; *Walker v. Fields*, 28 Ga. 237; *Cooke v. England*, 27 Md. 14; *Claggett v. Easterday*, 42 Md. 617; *Hammond v. Woodman*, 41 Me. 177; *Woods v. Allen*, 18 N. H. 28; *Read v. Barker*, 1 Vr. (N. J.) 378; *Detweiler v. Groff*, 10 Pa. St. 376; *Haas v. Choussard*, 17 Tex. 592.

*Mining experts.* *Blood v. Light*, 31 Cal. 115; *Clark v. Willett*, 35 Cal. 534;

*Koster v. Noonan*, 8 Daly (N. Y.) 232; *Stambaugh v. Smith*, 23 Ohio St. 584; *Snowden v. Idaho Quartz Mfg. Co.*, 55 Cal. 450.

*Nautical experts.* *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 183; *The City of Washington*, 92 U. S. 31; *Transportation Line v. Hope*, 95 Id. 297; *Weaver v. Alabama &c. Co.*, 35 Ala. 176; *Marcy v. Sun Ins. Co.*, 11 La. Ann. 748; *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1; *Parsons v. Manuf. &c. Ins. Co.*, 16 Gray (Mass.) 463; *Paddock v. Commonwealth Ins. Co.*, 104 Mass. 521; *Clark v. Detroit Locomotive Works*, 32 Mich. 348; *Hill v. Sturgeon*, 28 Mo. 323; *Price v. Powell*, 3 N. Y. 322; *Price v. Harts-horn*, 44 N. Y. 94; *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100; *Gurterman v. Liverpool &c. S. S. Co.*, 83 N. Y. 358; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77; *Steamboat v. Logan*, 18 Ohio, 375; *Reed v. Dick*, 8 Watts (Pa.) 479.

*Painters and photographers.* *Foulkes v. Chadd*, 4 Dougl. 157; *Barnes v. Ingalls*, 39 Ala. 193; *People v. Muller*, 96 N. Y. 408, where *Andrews, J.*, says: "It does not require an expert in art or literature to determine whether a picture is obscene, or whether printed words are offensive to decency and good morals. These are matters which fall within the range of ordinary intelligence, and a jury does not require to be informed by an expert before pronouncing upon them."

*Patent, copyright, and trademark experts.* *Cahoon v. Ring*, 1 Cliff. (U. S.) 592; *Lawrence v. Dana*, 4 Id. 72; *Hudson v. Draper*, Id. 181; *Waterbury Brass Co. v. New York &c. Co.*, 3 Fish. Pat. Cas. 54; *Corning v. Burden*, 12 How. (U. S.) 252; *Winans v. New York &c. R. R. Co.*, 21 Id. 88; *McMahon v. Tyng*, 14 Allen (Mass.) 167.

*Railroad experts.* *Mobile &c. R. R. Co. v. Blakeley*, 59 Ala. 471; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Jeffersonville R. R. Co. v. Lanham*, 27 Ind. 171; *Cooper v. Central R. R.*, 44 Iowa,

ing is the testimony of a witness, who saw the paper or signature actually written. But a great variety of cases must continually occur where such a direct kind of evidence cannot possibly be procured. The writing may be secret in its nature; or no person may have been present at the time; or if a person was present, he may be dead or unknown. In this deficiency of positive proof, the best evidence which the nature of the case admits, is the information of witnesses acquainted with the supposed writer, who, from seeing him write, have acquired a knowledge of his handwriting; for, in every person's manner of writing, there is a certain distinct prevailing character, which may be discovered by observation, and when once known, may be afterwards applied as a standard to try any other specimen of writing whose genuineness is disputed.<sup>1</sup> But there are many instances in which neither of these means of proof is available, and it is in these cases the opinions of chirographic experts are resorted to;<sup>2</sup> such opinions being usually based on a comparison of the writing, the genuineness of which is in question, with another writing by the same individual admitted or proved to be genuine. The foundation of this *comparison* is in the theory that in every person's handwriting there is a certain *characteristic* which constantly repeats itself, and that too, unconsciously, or even against the will of the writer; that this characteristic is beyond the control of the writer, and the expert having possessed himself of the particular characteristic of the handwriting of the person in question, can judge whether any other specimen of writing

140; *Seaver v. Boston &c. R. R. Co.*, 14 Gray (Mass.) 466; *Detroit &c. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Mott v. Hudson River R. R. Co.*, 8 Bosw. (N. Y.) 345; *Murphy v. New York &c. R. R. Co.* 66 Barb. (N. Y.) 125; *Hoyt v. Long Island R. R. Co.*, 57 N. Y. 678; *Bellefontaine &c. R. R. Co. v. Bailey*, 11 Ohio St. 333; *Cincinnati &c. R. R. Co. v. Smith*, 22 Id. 227; *Bixby v. Montpelier &c. R. R. Co.*, 49 Vt. 125; *Brabbitts v. Chicago &c. R'y Co.*, 38 Wis. 289.

*Miscellaneous rulings.* *Cottrill v. Myrick*, 12 Me. 222; *State v. Watson*, 65 Me. 74; *Prew v. Donahue*, 118 Mass.

438; *People v. Morrigan*, 29 Mich. 5; *James v. Finch*, 37 Miss. 461; *Wiggins v. Wallace*, 19 Barb. (N. Y.) 338.

<sup>1</sup> 2 Phil. Ev. \*595.

<sup>2</sup> But the opinion of a non-expert witness who has corresponded with the person whose handwriting is in question, or received business communications from such person in his handwriting, is also admissible. *Chaffee v. Taylor*, 3 Allen (Mass.) 598; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482; *Clark v. Freeman*, 25 Pa. St. 133. See also *Rogers v. Ritter*, 12 Wall. (U. S.) 317.

claimed to be his, is so or not, from the presence or absence of such distinguishing feature.<sup>1</sup>

Another test of genuineness is the *fac-simile* test. It has been asserted that no person writes even his own name twice alike, so that if upon superimposition against the light, two signatures perfectly coincide, one of them, at least, must be a forgery.<sup>2</sup>

(2) *Who are considered experts in handwriting.* While a witness, to testify as an expert, must possess certain qualifications not common to the mass of mankind, still it has been held that handwriting may be proved by any one having a knowledge of the character of the penmanship of the person whose handwriting is in question, even though the witness never saw the party write.<sup>3</sup> Experts, however, go farther than this, and may give their opinions on the genuineness of a signature, upon examination thereof at the time of trial, though unacquainted with the handwriting of the person whose signature it purports to be.<sup>4</sup> This is done after comparing the disputed signature with a genuine one.<sup>5</sup> But in order to render one a competent witness, as an expert, to the genuineness of a signature, he must have been educated in the business concerning which he testifies, or he must have acquired actual skill and knowledge thereon. It is not enough that he has sometimes compared signatures of other persons, when disagreements as to their genuineness had risen in the course of business.<sup>6</sup> The witness must be one of those "who by study, occupation, and habit, have been skilful in marking and distinguishing the characteristics of handwriting."<sup>7</sup> To qualify him as an expert, he "must have been educated in the business about which he testifies; or it must first be shown that he has acquired actual skill and scientific knowledge upon the subject."<sup>8</sup>

<sup>1</sup> See article on this subject in 2 Cr. L. Mag. 139; Plunkett v. Bowman, 2 McCord (S. C.) 139.

<sup>2</sup> See 4 Am. Law Rev. 625, 649.

<sup>3</sup> State v. Spence, 2 Harr. (Del.) 348; Reid v. Hodgson, 1 Cranch C. C. (U. S.) 491; Hammond's Case, 2 Me. 33; Page v. Homans, 14 Me. 478; Burnham v. Ayer, 36 N. H. 182; Jones v. Huggins, 1 Dev. (N. C.) L. 223; First Nat. Bank v. Omaha, 5 Neb. 247; Turnipseed v. Hawkins, 1 McCord (S. C.)

272. But see Pate v. People, 8 Ill. 644.

<sup>4</sup> Withee v. Rowe, 45 Me. 571; Hicks v. Person, 19 Ohio, 426; Calkins v. State, 14 Ohio St. 222. To the contrary, Wilson v. Kirkland, 5 Hill (N. Y.) 182.

<sup>5</sup> Woodman v. Dana, 52 Me. 9.

<sup>6</sup> Goldstein v. Black, 50 Cal. 462.

<sup>7</sup> Sweetser v. Lowell, 33 Me. 450.

<sup>8</sup> Goldstein v. Black, 50 Cal. 464.



In applying these and like tests of competency, bank tellers,<sup>1</sup> cashiers,<sup>2</sup> counting-house clerks,<sup>3</sup> engravers,<sup>4</sup> writing-masters,<sup>5</sup> photographers,<sup>6</sup> post-office clerks,<sup>7</sup> court clerks,<sup>8</sup> county clerks,<sup>9</sup> sheriffs,<sup>10</sup> conveyancers,<sup>11</sup> exchange-brokers,<sup>12</sup> and persons experienced in many other lines of employment, more or less connected with the critical examination of handwriting, have been held to possess the requisite qualifications of *experts*.

Thus we see that great importance is attached to the business experience of the witness, which must, ordinarily, have been such as to give him special skill.<sup>13</sup>

The court must pass, in the first instance, both upon the competency of the witness as an expert, and the sufficiency of the proof of writings to be used as standards of comparison.<sup>14</sup>

(3) *Comparison of writings.* In England, since 1854, comparison of handwritings placed in juxtaposition by experts, has been allowed;<sup>15</sup> and a number of the States of the Union

<sup>1</sup> *Johnson v. State*, 35 Ala. 370; *Sperden v. State*, 3 Tex. App. 156, 159.

<sup>2</sup> *Dubois v. Baker*, 30 N. Y. 355; *Hess v. State*, 5 Ohio, 5; *State v. Phair*, 48 Vt. 366. See also *Pate v. People*, 8 Ill. 644.

<sup>3</sup> *Reyburn v. Bellotti*, 10 Mo. 597; *State v. Ward*, 39 Vt. 225.

<sup>4</sup> *R. v. Williams*, 8 Car. & P. 34; *Norman v. Morell*, 4 Ves. 768.

<sup>5</sup> *Moody v. Rowell*, 17 Pick (Mass.) 490; *Bacon v. Williams*, 13 Gray (Mass.) 525.

<sup>6</sup> *Marcy v. Barnes*, 16 Gray (Mass.) 161; *Bacon v. Williams*, *supra*. Compare *Tyler v. Todd*, 36 Conn. 218.

<sup>7</sup> *Revett v. Braham*, 4 T. R. 49.

<sup>8</sup> *Amherst Bank v. Root*, 2 Metc. (Mass.) 522; *Yates v. Yates*, 76 N. C. 142.

<sup>9</sup> *State v. Phair*, 48 Vt. 366.

<sup>10</sup> *Yates v. Yates*, *supra*.

<sup>11</sup> *Vinton v. Peck*, 14 Mich. 287.

<sup>12</sup> *Johnson v. State*, 35 Ala. 370.

<sup>13</sup> *State v. Tompkins*, 71 Mo. 616. Yet it has been held that the fact that the employments of a witness have not been such as to require him to distinguish between true and simulated

handwriting, is not, of itself alone, a sufficient reason to preclude him from giving an opinion as to the genuineness of a disputed signature, though the opinion is founded merely upon a comparison of writings. *Sweetser v. Lowell*, 33 Me. 446. See also *Miles v. Loomis*, 75 N. Y. 287; *State v. Shinnborn*, 46 N. H. 497; *Calkins v. State*, 14 Ohio St. 222; *Macomber v. Scott*, 10 Kans. 335; *Moody v. Rowell*, 17 Pick. (Mass.) 490.

<sup>14</sup> *Nunes v. Perry*, 113 Mass. 274, where it is said that these questions involve so much of the element of fact that great consideration must necessarily be given to the decision of the judge at the trial. In all questions of this nature, the ruling at the trial will be sustained, unless it is made clearly to appear that the same was based upon some erroneous view of legal principles; or that the ruling was not justified by the state of the evidence as presented to the judge at the time. See also *Demeritt v. Randall*, 116 Mass. 331.

<sup>15</sup> 17 and 18 Vict. c. 125. The present statute provides, "Comparison of a disputed writing, with any writing

have enacted statutes on the subject, legalizing this mode of proof, and, so far as those States are concerned, ridding the law of the embarrassment of much conflict of opinion.<sup>1</sup>

proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." 28 and 29 Vict. c. 18, § 8. As to the operation of this provision, Mr. Taylor says, "Under this statutory law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge (see *Eagan v. Cowan*, 30 L. T. 223, in *Ir. Ex.*), may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause (*Birch v. Ridgway*, 1 *Fost. & F.* 270; *Cresswell v. Jackson*, 2 *Id.* 24); and next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves (*Cobbett v. Kilminster*, 4 *Fost. & F.* 490, *per Martin, B.*), or in the event of there being no jury, by the court." 2 *Tayl. Ev.* § 1668.

<sup>1</sup> *California*. "Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge." *Code Civ. Pro.* § 1944. *Georgia*. "Other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial." *Rev. Code*, 1873, p. 674, § 3840. *Iowa*. "Evidence respecting handwriting may be given by comparison made by experts or by the jury, with writings of the same person which are

proved to be genuine." *Code* 1873, § 3655. *Nebraska*. "Evidence respecting handwriting may be given by comparisons made by experts or by the jury, with writings of the same person which are proved to be genuine." *Comp. Stat.* 1881, p. 576, § 344. *New Jersey*. "In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings, and the testimony of witnesses respecting the same, may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; *provided, nevertheless*, that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy." *Rev.* 1877, p. 381, ¶ 19. *New York*. "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." *Laws* 1880, ch. 36, p. 141. *Oregon*. "Evidence respecting the handwriting may also be given, by a comparison made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom

In the absence of a statute, three several theories have prevailed in different jurisdictions in the United States:<sup>1</sup> (1) The first of these theories is, that the comparison of writings placed in juxtaposition is improper, and the opinions of experts based on such comparison are inadmissible. This theory has been adopted in the Supreme Court of the United States,<sup>2</sup> and in Alabama,<sup>3</sup> Illinois,<sup>4</sup> Kentucky,<sup>5</sup> Maryland,<sup>6</sup> Pennsylvania,<sup>7</sup> Texas,<sup>8</sup> Virginia,<sup>9</sup> and Wisconsin;<sup>10</sup> and was the theory adopted in New Jersey,<sup>11</sup> and Rhode Island,<sup>12</sup> prior to the enactment of the statutory provisions already cited, and up to the time of such enactment.

(2) The second theory is, that a comparison of writings placed in juxtaposition is proper, the writings being in evidence for another purpose and admitted to be genuine, and the opinions of scientific witnesses based on such comparison are admissible in evidence. Such is the theory held by the courts of Colorado,<sup>13</sup> Indiana,<sup>14</sup> Kansas,<sup>15</sup> Michigan,<sup>16</sup> Mis-

the evidence is offered." Gen. Laws, p. 259, § 755. *Rhode Island*. "Comparison of a disputed writing, with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Pub. Stat. 1882, p. 588, § 42. *Texas*. "It is competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath." Rev. Stat. 1879, Code Crim. Pro., Art. 754.

<sup>1</sup> For this analysis, and the statutory quotations given in the preceding note, the writer is indebted to the excellent work of Henry Wade Rogers, Esq., on Expert Testimony.

<sup>2</sup> *Strother v. Lucas*, 6 Pet. (U. S.) 763; *Moore v. United States*, 91 U. S. 270.

<sup>3</sup> *Little v. Beazley*, 2 Ala. 703; *State v. Givens*, 5 Ala. 747; *Kirksey v. Kirksey*, 41 Ala. 640.

<sup>4</sup> *Jumpertz v. People*, 21 Ill. 374; *Kernin v. Hill*, 37 Ill. 209.

<sup>5</sup> *Hawkins v. Grimes*, 13 B. Mon. 267; *McAlister v. McAlister*, 7 Id. 270.

<sup>6</sup> *Miller v. Johnson*, 27 Md. 36; *Tome v. Parkersburg & c. R. R. Co.*, 39 Md. 36.

<sup>7</sup> *Aumick v. Mitchell*, 82 Pa. St. 211; *Haycock v. Greup*, 57 Id. 438; *Travis v. Brown*, 43 Id. 9, 15; *Lodge v. Pipher*, 11 S. & R. 334; *Bank of Pennsylvania v. Jacobs*, 1 Pa. 178.

<sup>8</sup> *Handley v. Gandy*, 28 Tex. 211.

<sup>9</sup> *Rowt v. Kile*, 1 Leigh, 216.

<sup>10</sup> *State v. Miller*, 47 Wis. 530; *Hazleton v. Union Bank*, 32 Id. 34.

<sup>11</sup> *West v. State*, 2 Zab. (N. J.) 241, 242.

<sup>12</sup> *Kinney v. Flynn*, 2 R. I. 319.

<sup>13</sup> *Miller v. Eicholtz*, 5 Colo. 243.

<sup>14</sup> *Hazard v. Vickery*, 78 Ind. 64; *Forgery v. First Nat. Bank*, 66 Ind. 123, 125; *Burdick v. Hunt*, 43 Ind. 381; *Chance v. Indianapolis & c. Co.*, 32 Ind. 472.

<sup>15</sup> *Macomber v. Scott*, 10 Kan. 335.

<sup>16</sup> *Vinton v. Peck*, 14 Mich. 287; *Matter of Foster's Will*, 34 Mich. 21; *First National Bank v. Robert*, 41 Mich. 709.

souri,<sup>1</sup> and New York prior to legislative enactment already noted,<sup>2</sup> and North Carolina.<sup>3</sup>

(3) According to the third theory, experts are permitted to express an opinion; based not merely on a comparison of writings conceded to be genuine, but on writings, the genuineness of which has been proved on the trial for the express purpose of comparison. Such testimony has been received in Connecticut,<sup>4</sup> Maine,<sup>5</sup> Massachusetts,<sup>6</sup> Mississippi,<sup>7</sup> New Hampshire,<sup>8</sup> and Ohio.<sup>9</sup>

§ 300. **Effect and Value of Expert Testimony.**—The jury are to judge of the weight of expert testimony, and by applying the same tests as in the case of ordinary witnesses.<sup>10</sup> In

<sup>1</sup> *Corby v. Weddle*, 57 Mo. 452; *State v. Clinton*, 67 Mo. 380; *State v. Tompkins*, 71 Mo. 616; *Pourcelly v. Lewis*, 8 Mo. App. 593.

<sup>2</sup> *Dubois v. Baker*, 30 N. Y. 355.

<sup>3</sup> *Yates v. Yates*, 76 N. C. 142; *McLeod v. Bullard*, 84 N. C. 515.

<sup>4</sup> *Tyler v. Todd*, 36 Conn. 222; *Lyon v. Lyman*, 9 Conn. 59, 60.

<sup>5</sup> *Sweetser v. Lowell*, 33 Me. 446; *Woodman v. Dana*, 52 Me. 9; *Page v. Homans*, 14 Me. 478.

<sup>6</sup> *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *King v. Donahue*, 110 Mass. 155, 156; *Martin v. Wallis*, 11 Mass. 309, 312; *Martin v. Maguire*, 7 Gray, 177.

<sup>7</sup> *Wilson v. Beauchamp*, 50 Miss. 24.

<sup>8</sup> *State v. Hastings*, 53 N. H. 452.

<sup>9</sup> *Pavey v. Pavey*, 30 Ohio St. 600; *Bragg v. Colwell*, 19 Ohio St. 412; *Calkins v. State*, 14 Ohio St. 222; *Hicks v. Person*, 19 Ohio, 426.

As to the objections which may be raised to the introduction of specimens of writing not admitted to be genuine, or in the case for some other purpose, the Supreme Court of Kansas say: "The principal, if not the only, objections urged against this kind of evidence are as follows: 1st. The writings offered in evidence as specimens, may be manufactured for the occasion. 2d. Fraud may be practised in the selection of the writings. 3d. The other party may be surprised; he may not know what

documents are to be produced, and therefore he may not be prepared to meet the inferences sought to be drawn from them. 4th. The handwriting of a person may be changed by age, health, habits, state of mind, position, haste, penmanship, and writing materials. 5th. The genuineness of the specimens of handwriting offered in evidence may be contested, and others successively introduced, to the infinite multiplication of collateral issues, and the subversion of justice. 6th. Juries are too illiterate, and are not competent to judge of this kind of evidence." *Macomber v. Scott*, 10 Kan. 339.

<sup>10</sup> *Carter v. Baker*, 1 Sawy. (U. S.) 512; *Mitchell v. State*, 58 Ala. 418; *Tatum v. Mohr*, 21 Ark. 354; *Forgery v. First Nat. Bank*, 66 Ind. 123; *Johnson v. Thompson*, 72 Ind. 167; *State v. Secrist*, 80 N. C. 450; *Parnell v. Com.*, 86 Pa. St. 260; *Howard v. Providence*, 6 R. I. 516; *Pratt v. Rawson*, 40 Vt. 183.

"There is no rule of law that requires jurors to surrender their judgments implicitly to, or even to give a controlling influence to the opinions of scientific witnesses, however learned or accomplished they may be, and however they may speak with conceded intelligence and authority, aided by the accumulated results of a long experience." *Brehm v. Gt. Western R. R. Co.* 34 Barb. (N. Y.) 256, 272.

speaking of this kind of testimony the Supreme Court of Kansas say: "It must have its legitimate influence by enlightening, convincing, and governing the judgment of the jury, and must be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony. The jury cannot be required by the court to accept, as matter of law, the conclusions of the witnesses instead of their own."<sup>1</sup> They may exercise their own independent judgment.<sup>2</sup> The value of this sort of testimony must in the nature of things depend very much upon the peculiar circumstances of the particular case, and of these the jury are the judges. The court, in charging them, may comment upon the evidence given, if in so doing the jury are left to the guidance of their own convictions.<sup>3</sup> The evidence of experts, being merely the expression of opinions, is always exposed to a reasonable degree of suspicion. They are apt to be biassed

<sup>1</sup> *Anthony v. Stinson*, 4 Kan. 221.

<sup>2</sup> *Head v. Hargrave*, 14 Cent. L. J. 388, 389; s. c., 105 U. S. 45, where Mr. Justice Field thus lays down the law upon this subject: "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence, in determining the weight to be given to the opinions expressed; and it was

only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and, to act intelligently, they must judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty, and probably come to a wrong conclusion, if controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. . . . They should not have been instructed to accept the conclusions of the professional witnesses in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors."

<sup>3</sup> *Templeton v. People*, 10 Hun (N. Y.) 357.

in favor of the party calling them, and their evidence should be received by the jury with caution, and subjected to careful scrutiny. An instruction to such effect is not improper.<sup>1</sup>

<sup>1</sup> *Ibid.* But the following instruction was held erroneous in the same case: "There is no more reliance to be placed upon it (the testimony of the expert) than upon the testimony of any other person in this case. I regard you gentlemen of the jury as equally skilled, and as able to decide from the evidence, whether or not the prisoner was insane as Dr. Clymer." And the Supreme Court of Kansas has recently held that to instruct a jury that in "all cases expert testimony should be received and weighed with caution" was erroneous. *Atchi-*

*son &c. R. R. Co. v. Thul*, 19 Cent. L. J. 45. See also, upon the propriety of instructions upon this subject, *Humphries v. Johnson*, 20 Ind. 190; *Whittaker v. Parker*, 42 Iowa, 586; *Eggers v. Eggers*, 57 Ind. 461; *Cunco v. Bessoni*, 63 Ind. 524; *Tinney v. New Jersey Steamboat Co.*, 12 Abt. (N. Y.) Pr. n. s. 1; *Pratt v. Rawson*, 40 Vt. 183.

In the Appendix to *Rogers on Expert Testimony* will be found a very full compendium "of the opinions of the courts as to the value of expert testimony."

# PART V.



## ATTENDANCE AND COMPENSATION.





## PART V.

### ATTENDANCE AND COMPENSATION.

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#### CHAPTER XXVII.

##### SECURING ATTENDANCE. — PUNISHING DELINQUENTS. — PRIVILEGES OF WITNESSES IN ATTENDANCE AT COURT.

- § 301. Modes of compelling Attendance.
- § 302. Punishment for Refusal to attend.
- § 303. Or for Refusal to be sworn, or to testify.
- § 304. Or for Disobedience of Subpœna *duces tecum*.
- § 305. Privileges of Witnesses in Attendance at Court.

§ 301. **Modes of securing Attendance, —** (1) *Subpœna*. The ordinary process for obtaining the attendance of a witness is the writ of subpœna, which it is in the power of all courts having authority to hear and determine issues, whether civil or criminal, to issue; and its issuance is not a matter of discretion, but of right.<sup>1</sup> The subpœna is a judicial writ directed to the witness commanding him to appear at the court to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ.<sup>2</sup> Ordinarily the writ suffices for only one term of the court, and if the trial extends into another term, by adjournment or otherwise, the witnesses must be subpœnaed anew; but it seems that, at least in Alabama, where a party directs a subpœna for a witness, it is the duty of the clerk to issue it to each succeeding term, until the order is countermanded, or the suit disposed of.<sup>3</sup> The service of the subpœna is regulated in each State by statute and rules of court, as is also the requirement as to prepayment or tender of fees and travelling expenses: as to these matters the reader will consult the statute law of the particular forum; all that

<sup>1</sup> Edmondson v. State, 43 Tex. 230.

<sup>8</sup> Marsh v. Branch Bank at Mobile,

<sup>2</sup> 1 Greenl. Ev. § 309.

10 Ala. 57.

need be said here, being that a tender of fees is necessary only in civil actions.<sup>1</sup>

Where a party to a suit is present in court, he may be called as a witness without the service of a subpoena upon him.<sup>2</sup> In other cases a reasonable time should be allowed to enable the witness to prepare to attend court.<sup>3</sup> Service of a subpoena in the morning to attend in the afternoon of the same day, has been held too short a notice;<sup>4</sup> unless the person, on being served, admits, either expressly or impliedly, that the service is in time.<sup>5</sup>

(2) *Habeas corpus ad testificandum*. Where the person desired as a witness is restrained of his liberty, *e.g.*, imprisoned, or in the naval or military service, the proper course is to sue out a writ of *habeas corpus ad testificandum*; for which purpose application ought to be made to the court or to a judge, upon affidavit of the party applying, stating that he is a material witness, and willing to attend. Upon this application the court, in its discretion, will make a rule, or the judge will grant his *fiat* for a writ which is then sued out, signed, and sealed.<sup>6</sup>

(3) *Recognizance*. Another method, sometimes adopted in criminal cases, to secure the attendance of witnesses, especially such as cannot be trusted to appear voluntarily, is by compelling them to enter into recognizances to appear, or in default thereof, committing them until the time of their examination in court.<sup>7</sup>

<sup>1</sup> Chamberlain's Case, 4 Cow. (N. Y.) 49. See also *infra*, § 302, *subd.* (3).

<sup>2</sup> Goodpaster v. Voris, 8 Iowa, 334, where however, it is said that in such a case the court cannot compel him to testify. And the court may refuse to call him. Woodward v. Purdy, 20 Ala. 379. See also, as to various points of practice relative to subpoenas, and their service, *Re* Woodward, 12 Bankr. Reg. 297; Chicago &c. R. R. Co. v. Dunning, 18 Ill. 494; State v. Hopper, 71 Mo. 425; Yorks v. Peck, 31 Barb. (N. Y.) 350; People v. Van Wyck, 2 Cai. (N. Y.) 333; Anderson v. Johnson, 1 Sandf. (N. Y.) 713; Icehour v. Martin, Busb. (N. C.) L. 478; Neil v. Childs, 10 Ired. (N. C.) L. 195; Clark v. Boyd, 2 Ohio, 56; State v. Smith, 2 Bay (S. C.) 62;

Bone v. Hillen, 1 Mill (S. C.) 197; Smith v. Barger, 9 Yerg. (Tenn.) 322; Smith v. Wilbur, 35 Vt. 133; Neyland v. State, 13 Tex. App. 536.

<sup>3</sup> Hammond v. Stuart, 1 Str. 509.

<sup>4</sup> Barber v. Wood, 2 Moo. & R. 172.

<sup>5</sup> See Maunsell v. Ainsworth, 8 Dowl. P. C. 869; Jackson v. Seager, 2 Dowl. & L. 13. As to service on a person present in court, see Doe d. Jupp. v. Andrews, 2 Cowp. 845; Pitcher v. King, 2 Dowl. & L. 755. And see further Bowles v. Johnson, 1 W. Bl. 36; Blackburne v. Hargreave, 2 Lew. C. C. 259.

<sup>6</sup> 2 Phil. Ev. \*823, and cases cited. See also Maxwell v. Revis, 11 Nev. 213.

<sup>7</sup> See United States v. Butler, 1

(4) *Subpœna duces tecum*. If a witness has in his possession any deeds or writings which are required at the trial, a special clause must be inserted in the subpœna, called a *duces tecum*, commanding him to bring them with him. When the writings are in possession of the adverse party or his attorney, notice should be given to produce them; and if, after proof of a reasonable notice they are refused, secondary evidence of the contents will be admitted.<sup>1</sup>

§ 302. **Punishment of Witness for Refusal to attend.** — (1) *Refusal to attend court*. For a witness to disregard a subpœna to attend court has always been considered a contempt of the court issuing the subpœna,<sup>2</sup> and in such cases attachments will issue to compel attendance,<sup>3</sup> even though the witness be a member of Congress, if he is not attending a session or going to or returning from Congress.<sup>4</sup> Thus, the refusal of a garnishee to appear to a summons executed, is a contempt;<sup>5</sup> and under a statute requiring the courts to cause to appear before them mortgagors and all other persons who have any knowledge of the demand due upon mortgages of real estate, where it is sought to sell the equity of redemption therein, if the persons properly cited shall fail to appear they may be brought into court and compelled to answer in the same way that witnesses who are subpœnaed are brought in.<sup>6</sup> In such cases it need not appear, in order to make such witness liable, that such misconduct was calculated to or did

Cranch, C. Ct. 422; *Ex parte Shaw*, 61 Cal. 58; *Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572; *State v. Grace*, 18 Minn. 398; *State v. Zellers*, 2 Holst. (N. J.) 220; *State v. Walsh*, 3 New Jersey Law Jour. 119; *Means v. State*, 10 Tex. App. 16.

<sup>1</sup> *Warren v. Warren*, 1 Johns (N. Y.) 340. As to the consequences of disobedience of the subpœna *duces tecum*, see *infra*, § 304.

<sup>2</sup> See *Ex parte Humphrey*, 2 Blatchf. (U. S.) 228; *Ex parte Judson*, 3 Id. 89; *Ex parte Beebees*, 2 Wall. Jr. (U. S.) 127; *United States v. Moore*, Wall. C. C. (U. S.) 23; *In re Roelker*, 1 Sprague (U. S.) 276; *Mitchell v. Maxwell*, 2 Fla. 594; *Green v. State*, 17 Fla. 669; *Chicago &c. R. R. Co. v. Dunning*, 18 Ill. 494; *Com-*

*monwealth v. Carter*, 11 Pick. (Mass.) 277; *Burnham v. Morrissey*, 14 Gray (Mass.) 226; *Wilson v. State*, 57 Ind. 71; *Bleecker v. Carroll*, 2 Abb. (N. Y.) Pr. 82; *State v. Trumbull*, 1 South. (N. J.) 139; *Woods v. De Figanieri*, 1 Robt. (N. Y.) 607, 641; *Stephens v. People*, 19 N. Y. 549; *Icehour v. Martin*, Busb. (N. C.) L. 478; *Respublica v. Duane*, 4 Yeates (Pa.) 347; *Jackson v. Justices, &c.*, 1 Va. Cas. 314.

<sup>3</sup> *Mitchell v. Maxwell, supra*; *Green v. State, supra*; *Commonwealth v. Carter, supra*.

<sup>4</sup> *Respublica v. Duane*, 4 Yeates (Pa.) 347.

<sup>5</sup> *Jackson v. Justices, &c.*, 1 Va. Cas. 314.

<sup>6</sup> *Mitchell v. Maxwell*, 2 Fla. 594.

impair, etc., the rights or remedies of the party complaining thereof, as required in ordinary cases of contempt.<sup>1</sup> The witness is bound to obey a subpoena directed to him, no matter by what means it comes to his hands;<sup>2</sup> but where two subpoenas were served the same day on a witness, requiring his attendance at different places distant from each other, it was held that he might make his election which he would obey.<sup>3</sup> A refusal to obey a subpoena issued by a federal court is an offence against the federal government, within the meaning of section 1014 of the Revised Statutes of the United States;<sup>4</sup> but the court will not, generally, award an attachment against a witness residing in another district, where he shows no disposition to treat the process of the court with contempt.<sup>5</sup>

(2) *Refusal to attend before legislative body, or committee, or officer authorized to take testimony.* In Massachusetts, it is held that the refusal of a witness, duly notified or summoned, or who has voluntarily appeared, to attend or testify before the house of representatives or a committee of that house, is a contempt of the authority of the house, for which the house may cause him to be arrested and brought before the house.<sup>6</sup> So it is held in several jurisdictions that the refusal of a witness duly notified to attend before an examiner,<sup>7</sup> or master in chancery,<sup>8</sup> or magistrate empowered to take depositions,<sup>9</sup> is a contempt.

(3) *Necessity and sufficiency of service of subpoena, payment of fees, etc.* The court will not, as a general rule, pun-

<sup>1</sup> Woods v. De Figaniere, 1 Robt. (N. Y.) 607, 641.

<sup>2</sup> Chicago &c. R. R. Co. v. Dun-  
ning, 18 Ill. 494.

<sup>3</sup> Icehour v. Martin, Busb. (N. C.)  
L. 478.

<sup>4</sup> In re Ellerbe, 2 McCrary (U. S.)  
449.

<sup>5</sup> Ex parte Beebees, 2 Wall. Jr.  
(U. S.) 127.

Non-attendance also makes the delinquent witness liable to an action for damages (Robinson v. Trull, 4 Cush. (Mass.) 249; Prentiss v. Webster, 2 Dougl. (Mich.) 5; Connett v. Hamilton, 16 Mo. 442; Casbrouck v. Baker, 10 Johns. (N. Y.) 248; West v. Tuttle, 11 Wend. (N. Y.) 639; Hurd

v. Swann, 4 Den. (N. Y.) 75); and in some cases even to prosecution by indictment. Drake v. State, 60 Ala. 62. See also Com. v. Reynolds, 14 Gray (Mass.) 87.

<sup>6</sup> Burnham v. Morissey, 14 Gray (Mass.) 226. Compare Briggs v. Mat-  
sell, 2 Abb. (N. Y.) Pr. 156; Matter  
of Pillsbury, 56 How. (N. Y.) Pr. 290;  
Matter of Dickinson, 58 Id. 260.

<sup>7</sup> Commonwealth v. Newton, 1  
Grant (Pa.) Cas. 453.

<sup>8</sup> Brockman v. Angler, 12 Ill. 277.

<sup>9</sup> In re Jenckes, 6 R. I. 18. But  
it seems a board of supervisors cannot  
punish a witness who fails to appear  
before them. Re Blue, 46 Mich. 268.

ish a witness for non-attendance unless the subpoena was strictly served, and the witness designed to contemn the process and authority of the court.<sup>1</sup> So, under a statute allowing a party to examine his adversary before trial, the party to be examined cannot be punished for failure to attend to be examined, unless the order prescribed by the statute is served upon him.<sup>2</sup> But the witness may, by his own act, dispense with the legal form of serving a subpoena.<sup>3</sup> A witness is not liable to a forfeiture, who fails to attend on a subpoena in which he is summoned to appear before the grand jury; he should be summoned to appear before the court, to give evidence to the grand jury.<sup>4</sup> Nor is a resident of one State, while temporarily in another, if subpoenaed to attend court as a witness in the latter, liable to amercement for not attending, if he be out of the State when called out on the subpoena.<sup>5</sup> In Tennessee, it is not necessary that the witness should have been summoned in the county in which he resided to incur the forfeiture for non-attendance. A legal summons executed on him personally, or left at his place of residence, is sufficient.<sup>6</sup>

As a general rule, a witness will not be punished for contempt in failing to attend on the trial of a civil action unless his fees have been paid or tendered.<sup>7</sup> And a party made a witness by his adversary is as much entitled to fees, as a condition precedent to creating a duty to attend, as a third person.<sup>8</sup> Where a person is summoned as a witness out of the county in which he resides, he is not bound to attend

<sup>1</sup> *State v. Trumbull*, 1 South. (N. J.) 139; *United States v. Caldwell*, 2 Dall. (U. S.) 334.

<sup>2</sup> N. Y. Code Civ. Pro. § 873; *Tebo v. Baker*, 16 Hun (N. Y.) 182; *Loop v. Gould*, 17 Id. 585. See also *Hewlett v. Brown*, 1 Bosw. (N. Y.) 655.

<sup>3</sup> *Feree v. Strome*, 1 Yeates (Pa.) 303.

<sup>4</sup> *State v. Butler*, 8 Yerg. (Tenn.) 83.

<sup>5</sup> *Kinzey v. King*, 6 Ired. (N. C.) L. 76.

<sup>6</sup> *Smith v. Barger*, 9 Yerg. (Tenn.) 322.

<sup>7</sup> *Ogden v. Gibbons*, 2 South. (N. J.) 518; *Beaulieu v. Parsons*, 2 Minn. 37, where, upon the refusal of the

court to allow the defendant to prove his case upon cross-examination of the plaintiff's witness, the defendant said that he should call the witness at the proper time, and the plaintiff said that he had no objection to the witness remaining. The next day the witness could not be found when the defendant called him. It appeared that no fee had been tendered him for the second day, and that the defendant had not subpoenaed him. It was held that the defendant could not have an attachment against the witness. *S. P., Mattocks v. Wheaton*, 10 Vt. 493. *Contra*, *Smith v. Barger*, 9 Yerg. (Tenn.) 322.

<sup>8</sup> *Hewlett v. Brown*, 1 Bosw. (N. Y.) 655.

unless his travelling expenses of going to and returning from the place to which he is summoned are paid or tendered to him, or payment thereof waived by him.<sup>1</sup> In prosecutions for felony, witnesses for the defence must attend, whether their fees have been paid or tendered or not;<sup>2</sup> and in Wisconsin, this rule applies to all criminal cases, misdemeanors as well as felonies.<sup>3</sup>

Before an auditor, neither party is entitled to fees as a witness, whether testifying in his own favor or for his adversary; and neither party can properly refuse to testify when interrogated by the auditor, or by counsel, by permission of the auditor, because his testimony will favor the adverse party, or because his fees have not been paid.<sup>4</sup>

(4) *Excuses for non-attendance.* The general rule is that a witness duly subpoenaed is bound to make extraordinary efforts to attend; nothing but extreme poverty, or sickness of himself or family, will excuse him.<sup>5</sup> Thus, the fact that he deems his testimony immaterial will not excuse his non-attendance,<sup>6</sup> and the absence of a female witness will not be excused by the difficulty of bringing her to the court-house on account of lameness, provided her general health is good.<sup>7</sup> But no witness is bound to endanger his life by attendance at court.<sup>8</sup> And where it appeared that witnesses, against whom an attachment had issued for disobedience to a subpoena, had been so much indisposed as to be incapable of attending, they were discharged, and the costs of the attachment directed to abide the event of the suit.<sup>9</sup> So, serious illness of a witness' wife is a "sufficient cause for his failure to attend," within the statute.<sup>10</sup> In his efforts to comply with the subpoena, a witness is entitled to reasonable time for travel, availing himself of the usual modes of conveyance. He cannot be required to travel on Sunday, nor can he limit

<sup>1</sup> *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785.

<sup>2</sup> *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49.

<sup>3</sup> *West v. State*, 1 Wis. 209.

<sup>4</sup> *Whitney v. Pierce*, 40 N. H. 114.

<sup>5</sup> *People v. Davis*, 15 Wend. (N. Y.) 602.

<sup>6</sup> *Bonesteel v. Lynde*, 8 How. (N. Y.) Pr. 226.

<sup>7</sup> *Pipher v. Lodge*, 16 Serg. & R. (Pa.) 214.

<sup>8</sup> *Jackson v. Perkins*, 2 Wend. (N. Y.) 308.

<sup>9</sup> *Butcher v. Coats*, 1 Dall. (U. S.) 340. See also *Cutler v. State*, 42 Ind. 244; *State v. Hatfield*, 72 Mo. 518.

<sup>10</sup> Tenn. Code, § 3822; *Foster v. McDonald*, 12 Heisk. (Tenn.) 619; *Slaughter v. Birdwell*, 1 Head (Tenn.) 341.

his travel to thirty miles per day;<sup>1</sup> and where the service of the subpoena was so long delayed as not to give the witness reasonable time to prepare to attend the trial, his non-attendance will be excused on comparatively slight grounds, although the shortness of the notice is not, *per se*, an excuse.<sup>2</sup> If his excuse is a sufficient one he may excuse himself upon his own oath.<sup>3</sup> The inability of the witness to attend court must be decided in reference to the modes of travelling which are in use in the community. If there are modes not impracticable, and it does not appear but that they were in the power of the party summoned, his non-attendance cannot be attributed to inability.<sup>4</sup> Where the witness resides more than one hundred miles from a court of the United States, he is not compelled to attend on a subpoena, but his deposition may be taken, and his residence is proved, *prima facie*, by the certificate of the magistrate who takes it.<sup>5</sup> And although there is an act of Congress which allows subpoenas *ad testificandum* to run from the circuit courts into districts not their own, yet where the witness who has been thus subpoenaed shows no disposition to treat the process of the court with contempt, the issuing of an attachment is always matter of discretion with the court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the court will not compel his attendance, but will either postpone the cause or have his deposition taken.<sup>6</sup> So, also, the object of an attachment against a witness for contempt being to punish him, not to redress the party injured, if a party gives his witness leave of absence, and he departs, he is not in contempt, and, if attached, will be discharged at the cost of the party calling him.<sup>7</sup>

<sup>1</sup> Wilkie v. Chadwick, 13 Wend. (N. Y.) 49.

<sup>2</sup> Chalmers v. Melville, 1 E. D. Smith (N. Y.) 502.

<sup>3</sup> Livingstone v. Lucas, 6 Ala. 147.

<sup>4</sup> Eller v. Roberts, 3 Ired. (N. C.) L. 11.

<sup>5</sup> Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604.

In an early case it was held that if a witness, against whom an attachment

has issued, arrives before service of the process, and makes a reasonable excuse, the court will countermand the attachment on payment of the cost of issuing it. United States v. Scholfield, 1 Cranch C. Ct. 130.

<sup>6</sup> *Ex parte* Beebees, 2 Wall. Jr. (U. S.) 127.

<sup>7</sup> State v. Nixon, Wright (Ohio) 763.

So, where a witness is not requested

§ 303. **Punishment for Refusal to be sworn or to testify.**—

(1) *Refusal to be sworn.* In many jurisdictions there are statutory provisions enabling persons having conscientious scruples against the taking of an oath, to solemnly affirm that they will tell the truth upon the witness-stand. Quakers, among others, are generally allowed to qualify themselves to testify in this manner. But it has been held in Massachusetts that one who was not a Quaker could not claim this privilege.<sup>1</sup> In another case, a Jew, who refused to be sworn as a witness in a cause tried on a Saturday, because it was his Sabbath, was fined by the court.<sup>2</sup> In no case can a witness himself object to being sworn, or, when sworn, to answer questions, on the ground that his testimony or answer will subject him to a civil suit.<sup>3</sup> So, also, where complaint is made that an offence has been committed, the magistrate may compel the attendance of witnesses; and if any witness, on being brought before the magistrate, refuses to be sworn and to testify, he may be adjudged guilty of a criminal contempt, and punished by imprisonment.<sup>4</sup>

(2) *Refusal to testify, generally.* There can be no doubt that the refusal of a witness to testify at all, or to answer particular questions, pertinent to the issue, put to him either in a proceeding before the court itself or before a subordinate officer duly empowered by the court to take his deposition or conduct his examination, is a contempt of such court, provided always the court have jurisdiction of the controversy or proceeding in which the witness is required to give his evidence.<sup>5</sup> If the witness be competent, and the question pertinent to the issue, he should be compelled to answer.<sup>6</sup> If he perseveres in silence, when questioned, he may be com-

to remain for further cross-examination, he is not in contempt for failure to do so (*Hook's Estate*, 13 Phil. (Pa.) 390); and a nonsuit, though set aside at the same term at which it is taken, operates as a discharge of the witnesses in attendance. *Cochran v. Brown*, 1 Humph. (Tenn.) 329.

<sup>1</sup> *United States v. Coolidge*, 2 Gall. (U. S.) 364.

<sup>2</sup> *Stansbury v. Marks*, 2 Dall. (U. S.) 213.

<sup>3</sup> *Gorham v. Carroll*, 3 Litt. (Ky.) 221; *Black v. Coorgh*, Id. 226.

<sup>4</sup> *People v. Hicks*, 15 Barb. (N. Y.) 153. Compare *Re Morton*, 10 Mich. 208.

<sup>5</sup> *Matter of Allen*, 13 Blatchf. (U. S.) 271; *Whitcomb's case*, 120 Mass. 118, 121; *La Fontaine v. Underwriters*, 83 N. C. 132; *Stuart v. Allen*, 45 Wis. 158, 161; *Rex v. Almon*, Wilms. 243, 269; *Ex parte Doll*, 7 Phil. (Pa.) 595.

<sup>6</sup> *Ragland v. Wickware*, 4 J. J. Marsh. (Ky.) 530.



mitted for contempt, and confined until he does answer.<sup>1</sup> Such refusal is a contempt, no matter how respectfully and deferentially it may be made.<sup>2</sup> When sworn in chief, the witness is bound to state all the facts within his knowledge that are applicable to the case, and that can be proved by parol, and it can make no difference whether such testimony is given in answer to the interrogatories of the party against whom it operates or not.<sup>3</sup>

If, on the other hand, there is an entire want of jurisdiction on the part of the court or officer before whom he is called upon to testify, he may safely refuse to testify, such refusal being simply the disobedience of the unlawful order of a private person.<sup>4</sup> But this right of a mere witness to raise the question of jurisdiction in this manner has not met with the favor of the judges, and in several jurisdictions is virtually denied.<sup>5</sup> *A fortiori*, a witness cannot be permitted to refuse to answer a question on the ground that it is irrelevant. To hold that a witness could decide for himself upon the relevancy of a question, against the opinion of the judge presiding, or the officer taking the deposition, would be subversive of all order in judicial proceedings.<sup>6</sup> But in *Gihon v. Albert*,<sup>7</sup> it is said that a *defendant* may refuse to answer an illegal or improper question, upon an examination, under an order of reference; but if he refuses to answer a proper question he may be punished.

In later cases, however, it is held that the fact that the questions were improper furnishes no reason for impeaching the commitment of the witness for refusing to answer them.<sup>8</sup> The lawfulness or propriety of the questions are for the court to decide.<sup>9</sup> But where the witness demurs to a question, the question will be considered as waived, unless the party by whom it is put insists upon an answer, and takes the proper steps to have the demurrer disposed of.<sup>10</sup> In Indiana it would

<sup>1</sup> *Lott v. Sandifer*, 2 Rep. Con. Ct. (S. C.) 167.

<sup>2</sup> *Holman v. Austin*, 34 Tex. 668.

<sup>3</sup> *Roberts v. Garen*, 2 Ill. 396.

<sup>4</sup> *Matter of Morton*, 10 Mich. 208; *Matter of Hall*, Id. 210; *Holman v. Austin*, 34 Tex. 668; *Ex parte Peck*, 3 Blatchf. (U. S.) 113.

<sup>5</sup> *In re Abeles*, 12 Kan. 451; *Commonwealth v. Roberts*, 2 Clark (Pa.) L. J. 340.

<sup>6</sup> *Ex parte McKee*, 18 Mo. 600.

<sup>7</sup> 7 Paige (N. Y.) 278. See also *Holman v. Mayor*, 34 Tex. 668, 673.

<sup>8</sup> *People v. Cassels*, 5 Hill (N. Y.) 165; *People v. Sheriff*, 7 Abb. (N. Y.) Pr. 96.

<sup>9</sup> *Bradley v. Veazie*, 47 Me. 85; *Forbes v. Mecker*, 3 Edw. (N. Y.) 412.

<sup>10</sup> *Mowatt v. Graham*, 1 Edw. (N. Y.) 13. Compare *Winder v. Diffeffer*, 2 Bland (Md.) 166.

seem that expert witnesses may refuse to testify until the payment of a professional fee;<sup>1</sup> but this is not deemed to be the law in other jurisdictions.

(3) *Refusal to testify before grand jury.* The grand jury being merely an appendage of the court,<sup>2</sup> the refusal by a witness to answer questions put by them is a contempt of the court by whose order the grand jury was impanelled.<sup>3</sup> In Alabama, however, a witness, summoned before the grand jury to give evidence as to violations of the laws of the State, who declines to answer, may be proceeded against by indictment, but cannot be fined for a contempt.<sup>4</sup>

(4) *Refusal to testify before legislative body.* The decisions as to the punishability of a witness summoned before a legislative body or committee, who refuses to answer questions put to him by such body or committee, are somewhat in conflict.<sup>5</sup> In Massachusetts it is laid down that a wilful and unjustifiable refusal by a witness legally brought before the house of representatives, to testify before the house or one of its committees, is "disrespect to the house by contemptuous behavior in its presence," within the meaning of the constitution of the State, for which he may be imprisoned by order of the house for a term not exceeding thirty days.<sup>6</sup> In a very recent case, decided by the General Term of the Supreme Court of New York,<sup>7</sup> the relator was subpoenaed to appear and testify as a witness before a committee of the senate. Acting under the advice of counsel, he declined to

<sup>1</sup> *Buchman v. State*, 59 Ind. 1; *Dill v. State*, Id. 15, 23.

<sup>2</sup> *United States v. Hill*, 1 Brock. (U. S.) 156; *Denning v. State*, 22 Ark. 131, 132; *Cherry v. State*, 6 Fla. 679, 685; *Heard v. Pierce*, 8 Cush. (Mass.) 338, 339; *Commonwealth v. Bannon*, 97 Mass. 214, 219; *People v. Naughton*, 7 Abb. (N. Y.) Pr., s. s., 421; *Lewis v. Wake County*, 74 N. C. 194, 198; *Commonwealth v. Crans*, 3 Pa. L. J. 449, 450.

<sup>3</sup> *United States v. Canton*, 1 Cranch C. C. 150; *Lockwood v. State*, 1 Ind. 161; *Ex parte Maulsby*, 13 Md. 625; *Heard v. Pierce*, 8 Cush. (Mass.) 338; *Commonwealth v. Bannon*, 97 Mass. 214; *People v. Kelly*, 24 N. Y. 74;

*People v. Fancher*, 4 Thomp. & C. (N. Y.) 476.

<sup>4</sup> *State v. Blocker*, 14 Ala. 450.

<sup>5</sup> See *supra*, §§ 2, 60.

<sup>6</sup> Mass. Const. ch. 1, § 3, art. 10; *Burnham v. Morissey*, 14 Gray (Mass.) 226. S. P., in Wisconsin, *Falvey v. Massing*, 7 Wis. 630. Compare *Briggs v. Matsell*, 2 Abb. (N. Y.) Pr. 156, where the witness attended pursuant to the subpoena and submitted to be sworn, and then stated that he declined, generally, to answer any questions, and none were put to him by the committee, and an attachment was refused.

<sup>7</sup> *People, ex rel. McDonald, v. Keeler*, 29 Alb. L. J. 511; s. c., 32 Hun (N. Y.) 563; 66 How. Pr. 487.

answer sundry questions, and retired from the presence of the committee, and refused to be further examined. Thereafter, he was adjudged to be in contempt by the senate; a warrant was issued for his arrest and he was committed to jail. The court held, on *habeas corpus*, *first*, that the relator was not bound to answer the questions put to him, and that he was justified in withdrawing when the right to have counsel was refused; *second*, that in the case at bar the senate had neither inherent nor conferred power to punish the relator as for contempt; his imprisonment was therefore illegal, and he was entitled to his discharge. The principle on which this case was based was, that except when engaged in the judicial functions authorized by the constitution, neither branch of the legislature has any power to punish, as for contempt, a refusal by a witness to answer questions put to him.

(5) *Refusal to testify on ground of interest.* At common law, the plaintiff upon the record, or the party in interest for whose benefit the suit is brought, cannot, unless he waive his privilege, be compelled to give testimony for the defendant.<sup>1</sup> So, also, a party in interest, in a suit in another State, cannot be compelled to testify before a magistrate as a witness in that suit.<sup>2</sup> But a witness who has voluntarily become interested in the matter in dispute, after his knowledge thereof, and before suit was commenced, may be compelled to testify.<sup>3</sup> And if a witness in court refuses to answer questions touching his interest in the cause, he may be committed as for a contempt, and closely confined, without bail or mainprise, till he purges the contempt and answers.<sup>4</sup> Thus, on the trial of an indictment, the defendant has a right to ask a witness whether any person, on behalf of the government, has made to the witness any offer of reward, in relation to the testimony which he should give in a certain class of cases comprehending the case on trial.<sup>5</sup> So, also, a cashier of a

<sup>1</sup> *Owings v. Low*, 5 Gill & J. (Md.) 134; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174. *Contra*, *Conover v. Bell*, 6 Monr. (Ky.) 157; *Stevens v. Whitcomb*, 16 Vt. 121; *Garey v. Frost*, 5 Ala. 636.

<sup>2</sup> *People v. Irving*, 1 Wend. (N. Y.) 20.

<sup>3</sup> *Tatum v. Lofton, Cooke* (Tenn.) 115; *Patton v. Brown*, Id. 126. Com-

pare *Simons v. Payne*, 2 Root (Conn.) 406.

<sup>4</sup> *Lott v. Burrill*, 2 Mill (S. C.) Const. 167.

<sup>5</sup> *Commonwealth v. Sacket*, 22 Pick. (Mass.) 394. Compare *Hugely v. Holstein*, 35 Ga. 271; *French v. Price*, 24 Pick. (Mass.) 13.

corporation is not protected from testifying in a case in relation to dealings of the corporation with a party to the suit.<sup>1</sup> And in supplementary proceedings, after judgment, a witness is bound to answer fully any question tending to disclose any property of the debtor, whether held by him or by a fraudulent transferee who holds in fraud of creditors;<sup>2</sup> and the judgment debtor's wife may be required to disclose whether she has property of her husband under her control, and may be attached as for a contempt for refusing to answer.<sup>3</sup>

§ 304. **Punishment for Disobedience of Subpœna duces tecum.** — The office of the writ of subpœna *duces tecum* extends only to compel the *bringing into court*, by a party or witness, of books and papers of which he has control, and an inspection of which is deemed to be essential to the proper determination of the issues presented for trial. The writ has no effect upon the question of the admissibility of books and papers so brought in, as evidence in the case.<sup>4</sup>

Nor does it follow from the mere fact that the witness has brought the documents into the court-room, in response to the requirement of the writ, that he must produce them in evidence;<sup>5</sup> that is a matter lying within the discretion of the court;<sup>6</sup> and while, in proper cases, the court will not hesitate to compel their production,<sup>7</sup> yet if the witness has a lawful or reasonable excuse for withholding the documentary evidence called for in the writ, he will not be compelled to produce it; but, in such a case, of the lawfulness or reasonableness of the excuse, the court, and not the witness, is to judge.<sup>8</sup> Thus, the court will not, through the agency of this

<sup>1</sup> *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

<sup>2</sup> *Lathrop v. Clapp*, 40 N. Y. 328.

<sup>3</sup> *O'Brien's petition*, 24 Wis. 547.

<sup>4</sup> *Campbell v. Dalhousie*, L. R. 1 Sch. App. 496; *Bonesteel v. Lynde*, 8 How. (N. Y.) Pr. 226, 233; *Mott v. Consumer's Ice Co.*, 52 How. (N. Y.) Pr. 244; *Sherman v. Barrett*, 1 McMull. (S. C.) 147.

<sup>5</sup> *King v. Dixon*, 3 Burr. 1687. See also *Campbell v. Johnston*, 3 Del. Ch. 94.

<sup>6</sup> *Bonesteel v. Lynde*, *supra*; *Amey v. Long*, 9 East, 475, 485.

<sup>7</sup> *Lane v. Cole*, 12 Barb. (N. Y.)

680; *Central Nat. Bank v. Arthur*, 2 Sweeney (N. Y.) 194.

<sup>8</sup> *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Chaplain v. Briscoe*, 5 Sm. & M. (Miss.) 198; *Lane v. Cole*, 12 Barb. (N. Y.) 680. That the papers are private is not a good excuse for not producing them. *Burnham v. Morissey*, 14 Gray (Mass.) 226; *Re Dunn*, 9 Mo. App. 255. In *Bonesteel v. Lynde*, cited *supra*, the plaintiff, learning that defendant had subpœnaed a witness to bring certain papers, obtained possession of them from the witness in order to defeat the subpœna. It was held that his neglect to produce them on

process, compel a party to produce papers which would strip him of his title;<sup>1</sup> and in all cases it is a question for the consideration of the judge at the trial whether, upon the principles of reason and equity, production should be required under a subpoena.<sup>2</sup> In *Sudlow v. Knox*,<sup>3</sup> it was held not to be a contempt for a party to refuse to *leave* his books with a referee, under an order requiring him to *produce* them before such referee.

As to the use of the writ to compel the production of telegraphic dispatches, see the cases cited below.<sup>4</sup>

§ 305. **Privileges of Witnesses in Attendance at Court.** — In this place we propose to consider the exemption of a witness, while attending court as such, from the service of civil process, and from arrest on such process. The privilege to refuse to answer on the grounds of self-crimination, tendency of questions to create pecuniary liability, loss of character, etc., and the rules relative to privileged communications, have been already discussed.<sup>5</sup>

the trial, pursuant to defendant's notice requiring him to do so, was a contempt. Under such circumstances, a denial of knowledge as to where the papers are, is no excuse.

<sup>1</sup> *Miles v. Dawson*, 1 Esp. Cas. 405. S. P., *Campbell v. Dalhousie*, L. R. 1 Sch. App. 462.

<sup>2</sup> *Amey v. Long*, 9 East, 475, 485. See also *Corson v. Dubois*, 1 Holt N. P. 87.

<sup>3</sup> 7 Abb. (N. Y.) Pr., n. s., 411.

A subpoena *duces tecum* cannot issue to a public officer to bring original papers into court when certified copies would be evidence. *Corbett v. Gibson*, 16 Blatchf. (U. S.) 334; *Delaney v. Regulators, &c.*, 1 Yeates (Pa.) 403. And, generally, officers of corporations are not bound to produce documents belonging to the corporation. But see *Central &c. R. R. Co. v. Twenty-third St. R. R. Co.*, 53 How. (N. Y.) Pr. 45; *Boorman v. Atlantic &c. R. R. Co.*, 17 Hun (N. Y.) 555. Thus, a clerk in a bank is not bound, on a subpoena *duces tecum*, to produce the books of the bank, they not being under his control. *Bank of Utica v. Hilliard*, 5 Cow. (N. Y.) 153. But a joint stock company

is not such a corporation as to entitle one of its officers to refuse to produce documents in his custody when required by subpoena. *Woods v. De Figanieri*, 1 Robt. (N. Y.) 659. So, the clerk of an executive council cannot be attached for disobeying a subpoena *duces tecum* commanding him to bring into court a paper submitted to the council for the purpose of enabling it to perform its executive functions, and filed among its papers. The clerk ought not to take such paper from the files without the order of the council. *Morris v. Creel*, 2 Va. Cas. 49. Nor can such a writ be issued to the printer of a newspaper, to produce his papers containing the advertisements of county commissioners for the sale of unseated lands for taxes. *Shippen v. Wells*, 2 Yeates (Pa.) 260. Nor to a witness, not a party, to compel him to bring before the court patterns for a stove. *Re Shepard*, 18 Blatchf. (U. S.) 225.

<sup>4</sup> *United States v. Babcock*, 3 Dill. (U. S.) 566; *United States v. Hunter* 15 Fed. Rep. 712; *Henisler v. Freedman*, 2 Pars. (Pa.) Sel. Cas. 274.

<sup>5</sup> *Supra*, Chaps. XXI-XXIII.

The general rule is, that witnesses, as well as the parties in a suit, are protected by courts of justice, and privileged from arrest on *civil* process, during the necessary time consumed by them in going to the place where their attendance is required, in staying there for the purpose of such attendance, and in returning thence.<sup>1</sup> And, in ordinary cases, it is not necessary for the protection of a witness, that he should have been served with a subpoena, if, upon application to him, he consented to attend without one.<sup>2</sup> A reasonable time is allowed to the witness for going and returning; and in making this allowance the courts are disposed to be liberal.<sup>3</sup>

But the privilege does not extend to arrest upon criminal process, or *quasi* criminal process,<sup>4</sup> nor is a witness privileged from being arrested by his bail: the bail may take him, after he has finished his evidence, for the purpose of surrendering him.<sup>5</sup>

<sup>1</sup> Serving process not bailable, is not an arrest within the rule. It is like a summons. *Legrand v. Bedinger*, 4 Mon. (Ky.) 539. An arrest on attachment to compel payment of costs, is an arrest on civil process within the rule. But whether an arrest on an attachment where the court might fine and imprison be so? *Quære*. *Snelling v. Watrous*, 2 Paige (N. Y.) 314.

<sup>2</sup> *Arding v. Flower*, 8 T. R. 536; *Walpole v. Alexander*, 3 Dougl. 45; *United States v. Edmi*, 9 S. & R. (Pa.) 147; *Norris v. Beach*, 2 Johns. (N. Y.) 294; *Sanford v. Chase*, 3 Cow. (N. Y.) 381. But see also *McNiel's Case*, 6 Mass. 264; *Rogers v. Bullock*, 2 Penn. (N. J.) 516.

<sup>3</sup> 2 W. Bl. 1113; *Hatch v. Blisset*, Gilb. Ca. 308; cit. 2 Str. 986; 13 East, 16, *n. a.* See also *Tidd Pr.* 195, and *Strong v. Dickenson*, 1 Mees. & W. 493.

The privilege does not extend throughout the term at which the cause is marked for trial, nor will it protect the witness while engaged in transacting his private business, after he is discharged from the obligation of his subpoena. *Smyth v. Banks*, 4 Dall. (U. S.) 329. But he is protected while at his lodgings, as well as while

going to and returning from court. Thus, a citizen of New York, who, while attending the Circuit Court of the United States in Philadelphia as a party, was subpoenaed to attend the same court as a witness in another cause, and after the service of the subpoena, was arrested at his lodgings on *ca. sa.* issued out of the Supreme Court of Pennsylvania, was immediately discharged by the Circuit Court. *Hurst's Case*, 4 Dall. (U. S.) 387. The party (of Beckenham in Kent) attended in London, and lingered two hours after he left court, and after he had called at several places in Westminster in a direction opposite to his residence; but when arrested, he had just crossed London Bridge in a direction towards home. The court said that the delay might, for aught that was shown, have been devoted to refreshment; and it was not sworn by the plaintiff, on whom the *onus* lay, positively, that the calls, at which he was not present, might not have been before the party attended the court. *Selby v. Hills*, 8 Bing. 166.

<sup>4</sup> *In re Douglas*, 3 Q. B. 837.

<sup>5</sup> *Ex parte Lyne*, 3 Stark, 132. S. P., *Marshall v. Carhart*, 20 Ga. 419.

The fact that the witness comes from another State does not deprive him of his privilege from arrest. If his privilege be violated, he will be discharged absolutely, without even filing common bail.<sup>1</sup> In New York, such a witness is privileged from the service of any process for the commencement of a civil action against him.<sup>2</sup> But the privilege of a witness attending before Congress, or any of its committees, does not extend to freedom from the service of a simple summons, but only from arrest.<sup>3</sup>

To prevent a witness from attending court,<sup>4</sup> or serving him with summons or other process in the immediate or constructive presence of the court upon which he is in attendance,<sup>5</sup> is a contempt of court, and punishable as such; and so is the spiriting away of a witness,<sup>6</sup> or any other violation of his privilege.<sup>7</sup>

<sup>1</sup> *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Jones v. Kreauss*, 4 Stew. (N. J.) 211.

<sup>2</sup> *Person v. Grier*, 66 N. Y. 124; *Seaver v. Robinson*, 3 Duer. (N. Y.) 622; *Grafton v. Weeks*, 7 Daly (N. Y.) 523.

<sup>3</sup> *Wilder v. Welsh*, 1 MacArth. (D. C.) 566.

<sup>4</sup> *Com. v. Feely*, 2 Va. Cas. 1.

<sup>5</sup> *Cole v. Hawkins*, Andr. 275; *Miles v. McCullough*, 1 Binn. (Pa.) 77.

<sup>6</sup> *Hasket v. State*, 51 Ind. 176.

<sup>7</sup> *Bridges v. Sheldon*, 18 Blatchf. (U. S.) 507. See also 1 Burr's Trial, 352.

## CHAPTER XXVIII.

### COMPENSATION OF WITNESSES.

§ 306. Of Ordinary Witnesses.

§ 307. Of Experts.

§ 306. **Of Ordinary Witnesses.**—We have already seen that the prepayment of fees is a prerequisite to the right to compel the attendance of a witness or punish him for failure to attend.<sup>1</sup> The subjects of the amount of fees to which a witness who obeys the subpoena is entitled for attending; for his travelling expenses in coming and going; for his disbursements while in attendance; and many other matters connected with these, are regulated by statute in the several jurisdictions, and the decisions are, for the most part, merely constructions of the provisions of such local statutes. Any attempt to extract from them principles of general application would be next to futile, owing to the difference in character of the statutory provisions, but the cases have been carefully collated, and will be found cited below, arranged according to their particular subject-matter, and in the alphabetic order of the states.<sup>2</sup>

<sup>1</sup> *Supra* § 302, subd. 3.

<sup>2</sup> *Right to fees, generally.* Russell v. Ashley, Hempst (Ark.) 546; Dodge v. Stiles, 26 Conn. 463; Angell v. Union County, 8 Bradw. (Ill.) 244; Ellison v. Stevenson, 6 T. B. Mon. (Ky.) 271; Hutchens v. Eden, 3 Har. & M. (Md.) 101; Farmer v. Storer, 11 Pick. (Mass.) 241; Mathes v. Bennett, 21 N. H. 204; Hurd v. Fogg, 22 N. H. 98; Ford v. Monroe, 6 How. (N. Y.) Pr. 204; De Benneville v. De Benneville, 1 Binn. (Pa.) 46; Lagrosse v. Curran, 10 Phil. (Pa.) 140; Price v. McGee, 1 Brev. (S. C.) 455; Rice v. Palmer, 2 Bail. (S. C.) 117; Taylor v. M'Mahan, Id. 131; Johnson v. Wideman, 1 Cheves (S. C.) 26; Gray v. Alexander, 7 Humph. (Tenn.) 16; Davis v. State, 3 Lea (Tenn.) 376; Hardy v. De Leon,

7 Tex. 466; Sapp v. King (Tex.) 1 S. W. Rep. 466.

*Attendance fee.* Leigh v. Hodges, 4 Ill. 15; *Re* Thomas (Kan.) 1 Dill. (U. S.) 420; Brown v. Moore, 3 J. J. Marsh. (Ky.) 306; Kennedy v. Wright, 34 Me. 351; Ogden v. Gibbons, 2 South (N. J.) 518; Willink v. Reckle, 19 Wend. (N. Y.) 82; Anonymous, 3 Hill (N. Y.) 457; *Re* Corwin, 6 Abb. (N. Y.) N. Cas. 437; Carpenter v. Taylor, Term. Rep. (N. C.) 265; Holden v. Shore, 1 R. I. 287; Barton v. Bird, 1 Overt. (Tenn.) 66; Hopkins v. Waterhouse, 2 Yerg. (Tenn.) 230; Hodges v. Nance, 1 Swan (Tenn.) 57; Albright v. Corley, 54 Tex. 372.

*Mileage, or travel fee.* Anonymous, 5 Blatchf. (U. S.) 134; Anderson v. Moc, 1 Abb. (U. S.) 299; The Sunny-



## § 307. Of Experts.—As a general rule witnesses are not

side, 5 Ben. (U. S.) 162; *The Leo*, Id. 486; *Dutcher v. Justices, &c.*, 38 Ga. 214; *Meffert v. Dubuque &c. R. R. Co.*, 34 Iowa, 430; *Lyon County Comm'rs v. Chase*, 24 Kan. 774; *Union Pacific R'y Co. v. Harris*, 29 Kan. 275; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Kingfield v. Pullen*, 54 Me. 398; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Wilson v. Knox*, 12 N. H. 347; *Norris v. Hassler*, 8 New Jersey Law J. 98; *Jackson v. Scott*, 6 Johns. (N. Y.) 330; *Jackson v. Hoagland*, 1 Wend. (N. Y.) 69; *Bank of Niagara v. Austin*, 6 Id. 548; *Lamb v. Coe*, 19 Id. 127; *Ehle v. Bingham*, 4 Hill (N. Y.) 595; *Taaks v. Schmidt*, 25 How. (N. Y.) Pr. 340; *Crawford v. Abraham*, 2 Oreg. 165; *Johnson v. A. & N. P. R. R. Co.*, 1 Pa. County Ct. Rep. 10; *Speigner v. Cooner*, 9 Rich. (S. C.) L. 120; *Albany v. Derby*, 30 Vt. 718.

*Fee for continued attendance.* *Whipple v. Cumberland Cotton Co.*, 3 Story (U. S.) 84; *Schott v. Benson*, 1 Blatchf. (U. S.) 564; *Hathaway v. Roach*, 2 Woodb. & M. 63; *Floyd County Comm'rs v. Black*, 65 Ga. 384; *Gunnison v. Gunnison*, 41 N. H. 121; *Bliss v. Brainard*, 42 N. H. 255; *Nichols v. Doty*, 3 Cow. (N. Y.) 352; *Titus v. Bullen*, 6 Wend. (N. Y.) 562; *Rogers v. Rogers*, 2 Paige (N. Y.) 458; *Vence v. Speir*, 18 How. (N. Y.) Pr. 168; *Muscott v. Runge*, 27 Id. 85; *Thompson v. Hodges*, 3 Hawks (N. C.) 318; *Carter v. Wood*, 11 Ired. (N. C.) L. 22; *Bratton v. Clendenin, Harp.* (S. C.) 454; *Abbott v. Johnson*, 47 Wis. 239.

*Compensation of witness summoned in several suits.* *Parker v. Cartzler*, 5 McLean (U. S.) 4; *Findley v. Wyser*, 1 Stew. (Ala.) 23; *Pulaski County v. Downer*, 10 Ark. 588; *Robison v. Banks*, 17 Ga. 211; *Hardin v. Polk County*, 39 Iowa, 661; *Taylor v. Vermont &c. R. R. Co.*, 1 Gray (Mass.) 422; *Hicks v. Brennan*, 10 Abb. (N. Y.) Pr. 304; *Vence v. Speir*, 18 How. (N. Y.) Pr. 168; *Sanders v. Failing*, 1 Thomp. & C. (N. Y.) 64; *Batdorf*

*v. Eckert*, 3 Pa. St. 267; *Re McCullough*, 12 Phil. (Pa.) 576; *House v. Barber*, 10 Vt. 158; *McHugh v. Chicago &c. R'y Co.*, 41 Wis. 79.

— or by both parties. *Renfro v. Kelly*, 10 Ala. 338; *Peace v. Person*, 1 Murph. (N. C.) 188.

*Compensation of witness under recognition or committed.* *Ex parte Johnson*, 1 Wash. (U. S.) 47; *Higginson's Case*, 1 Cranch. C. Ct. 73; *Markwell v. Warren County*, 53 Iowa, 422; *Hutchins v. State*, 8 Mo. 288; *Ex parte Mitchell*, 17 N. H. 501.

*Fees of State witnesses in criminal cases.* *Cuthbert v. Lewis*, 6 Ala. 262; *Nicholas v. Trickey*, 19 Id. 92; *Barrett v. State*, 24 Id. 74; *Briggs v. Coleman*, 51 Id. 561; *Sargent v. Cavis*, 36 Cal. 552; *Comm'rs of Shawnee County v. Ballinger*, 20 Kan. 590; *Re Herrick*, 78 Ky. 23; *Lannahan v. Multnomah County*, 3 Oreg. 187; *Wilson v. County of York*, 11 Lan. Bar (Pa.) 170.

— of defendants in criminal cases. *Howell v. Blackwell*, 7 Ga. 443; *Donnelly v. County*, 7 Iowa, 419; *County of Jones v. County of Linn (Iowa)*, 25 N. W. Rep. 930; *Com. v. Williams*, 13 Mass. 501; *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49; *Little v. Todd*, 3 Rich. (S. C.) 91.

*Suits in forma pauperis.* *Morris v. Rippey*, 4 Jones (N. C.) L. 533.

*When a party is entitled to fees as a witness.* *George v. Starrett*, 40 N. H. 135; *Fulton Bank v. New York &c. Canal Co.*, 4 Paige (N. Y.) 127; *Elliott v. Lewis*, 3 Edw. (N. Y.) 40; *Van Dusen v. Bissell*, 29 How. (N. Y.) Pr. 481; *Christy v. Christy*, 6 Paige (N. Y.) 170; *Penny v. Brink*, 75 N. C. 68; *Rhoades v. Bank*, 12 Phil. (Pa.) 391; *Ganse v. Edminston*, 35 Tex. 69.

*Witnesses examined before grand jury.* *State v. Edwards*, 13 Fla. 573; *State v. Treadway*, 3 Lea (Tenn.) 55.

*Effect of summoning unnecessary witnesses.* *Davis v. Melvin*, 1 Ind. 136; *Brookshire v. Brookshire*, 8 Ired. (N. C.) L. 74; *Holmes v. Johnson*, 11 Id. 55; *Commonwealth v. Wood*, 3

compensated for loss of time, merely,<sup>1</sup> but the case of an expert witness would seem to differ from that of an unprofessional witness called simply to depose to matters of fact. The expert is summoned to speak to a matter of opinion, depending on his skill in a particular profession or trade; the ordinary witness is bound, as a matter of public duty, to speak to the fact which has occurred within his knowledge; but the expert is under no such obligation, and is selected by the party to give his opinion merely; and he is entitled, therefore, to demand a compensation for loss of time.<sup>2</sup>

In some of the states extra compensation to experts is provided for by statute: such is the case in Iowa,<sup>3</sup> North Carolina,<sup>4</sup> Rhode Island,<sup>5</sup> and possibly some other states. In Indiana, on the other hand, experts are compellable, *by statute*, to depose to their opinions without extra compensation.<sup>6</sup> In the absence of statutory provisions, extra compensation paid to an expert witness cannot be taxed in the bill of costs, but is a disbursement to be borne by the party calling such witness.<sup>7</sup>

The true rule seems to be that while an expert, like any other witness, may be compelled to attend and testify to any facts within his knowledge, without the payment or promise of extra compensation, yet he cannot be compelled to make any preliminary investigation of the facts involved, in order to prepare himself to give a professional opinion.<sup>8</sup> But the

Binn. (Pa.) 414; *Sherman v. Brown*, 4 Yerg. (Tenn.) 561; *Barton v. Bird*, 1 Overt. (Tenn.) 73.

*Witness' right of action for compensation.* *Hill v. White*, 1 Ala. 576; *Burns v. Howard*, 68 Ala. 352; *Crozier v. Berry*, 27 Ga. 346; *Worland v. Outten*, 3 Dana (Ky.) 477; *Holbrook v. Cooley*, 25 Minn. 275; *Leighton v. Twombly*, 9 N. H. 483; *Fuller v. Matrice*, 14 Johns. (N. Y.) 357; *Baker v. Brill*, 15 Johns. (N. Y.) 260; *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Stanley v. Hodges*, Cam. & N. (N. C.) 330; *Sweany v. Hunter*, 1 Murph. (N. C.) 181; *Belden v. Snead*, 84 N. C. 243; *Strein v. Zeigler*, 1 Watts & S. (Pa.) 259; *Utt v. Long*, 6 Id. 174; *Bagley v. Clement*, 2 McCord (S. C.) 244; *Wetherspoon v. Killough*, Mart. & Y. (Tenn.) 38; *Harris v. Coleman*, 8 Tex.

278; *Flores v. Thorn*, Id. 377; *Crawford v. Crain*, 19 Tex. 145.

<sup>1</sup> *Collins v. Godefroy*, 1 Barn. & Ad. 957; *Lonegan v. Roy*, Exch. Co., 7 Bing. 731.

<sup>2</sup> *Webb v. Page*, 1 Car. & K. 23.

<sup>3</sup> Code 1873, § 3814. See *Snyder v. Iowa City*, 40 Iowa, 646.

<sup>4</sup> Laws 1871, ch. 139, § 13.

<sup>5</sup> Pub. Stat. 1882, p. 733, § 15.

<sup>6</sup> Rev. Stat. 1881, p. 94, § 504. But see *Buchman v. State*, 59 Ind. 1; *Dills v. State*, Id. 15, 23.

<sup>7</sup> *Mask v. City of Buffalo*, 13 Rep. 251.

<sup>8</sup> *Gaston v. Board of Comm'rs*, 3 Ind. 497; *Lyon v. Wilkes*, 1 Cow. (N. Y.) 591; *Summers v. State*, 5 Tex. App. 374. In *People v. Montgomery* (13 Abb. (N. Y.) Pr. n. s. 207) it is held that "a witness meets the require-

question whether an expert can be compelled to testify to his opinion based upon the researches made by him in the ordinary course of his professional study and investigation, and not upon any special examination of the facts of the particular case, must still be regarded as an open question, it being impossible to harmonize the decisions relating to it.<sup>1</sup>

In England extra compensation is allowed,<sup>2</sup> and both there and here the theory on which such allowance is founded is, that professional and scientific knowledge is *property* which the public have no right to condemn to their own use without making suitable compensation therefor; though some of the cases proceed on the idea that it is loss of time only that should be compensated for, and that the expert should be paid more than the non-expert, because his time is of greater value. This latter theory has been deemed a hard one,<sup>3</sup> and whether it can stand the test of examination is considered doubtful.<sup>4</sup>

ments of a subpoena if he appears in court when required to testify, and gives proper impromptu answers to such questions as are then put to him. He cannot be required by virtue of the subpoena to examine the case, to use his skill and knowledge to form an opinion, nor to attend, hear and consider the testimony given, so as to be qualified to give a deliberate opinion on a question of science arising upon such testimony: hence, a professional witness, called as an expert, may be paid for his time, services, and expenses; and the question what amount is paid cannot, in the absence of anything to show bad faith, affect the regularity of the trial, though it may, perhaps, affect his credit with the jury. It is not improper for the district attorney to procure the attendance of skilled witnesses in appropriate cases, for a special compensation; nor will the fact that an expert attended and testified at his instance, under agreement for compensation, which was unknown to the defence until after witness' testimony was closed, be an irregularity affecting

the verdict." This case was followed in *Buchman v. State*, 59 Ind. 1, and *Dills v. State*, Id. 15. S. P., *Harvey v. Evansville &c. Steam Packet Co.*, 8 Biss. (U. S.) 99; *Le Mere v. McHale*, 30 Minn. 410.

<sup>1</sup> Writers on medical jurisprudence, for obvious reasons, take the negative side of this question (*Beck Med. Jur.* 920, 921; *Ordonaux Jurisp. Med.* §§ 114, 115), as do also the following legal adjudications: *Matter of Roelker*, 1 *Sprague* (U. S.) 276; *Buchman v. State*, *supra*; *U. S. v. Howe*, 12 Cent. L. J. 193.

The following cases adopt the affirmative view of the proposition stated in the text: *Ex parte Dement*, 53 Ala. 389; *Sumner v. State*, 5 Tex. App. 374; *Wright v. People*, 2 Lan. L. Rev. (Pa.) 379.

<sup>2</sup> *Webb v. Page*, 1 Car. & K. 25; *Parkinson v. Atkinson*, 31 L. J. C. P. N. s. 199; *Turner v. Turner*, 5 Jur. N. s. 839.

<sup>3</sup> See *Loneragan v. Royal Exchange Assurance*, 7 Bing. 725, 727; *Collins v. Godefroy*, 1 Barn. & Ad. 930.

<sup>4</sup> *Rogers Exp. Test.* § 194.



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